

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 16,165
—

476

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT
LIMITED, TRANS-ALASKAN AIRLINES, INC., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

—
On Petition to Review an Order of the Civil
Aeronautics Board
—

United States Court of Appeals
For the
District of Columbia Circuit

FILED

MAR 7 1961

PRINTED BY BYRON S. ADAMS, WASHINGTON, D.C.

Joseph B. Stewart
CLERK

INDEX TO JOINT APPENDIX

	Page
Application for Certificate of Public Convenience and Necessity	2
Motion to Dismiss Application	4
Answer of Great Lakes Airlines, Inc. to Motion of Bureau Counsel to Dismiss Application	7
Order Dismissing Applications	14
Petition for Reconsideration of Board Order No. E-16050 dated November 22, 1960	22
Order Denying Petitions for Reconsideration	28
Prehearing Order of the United States Court of Ap- peals for the District of Columbia	29
Prehearing Conference Stipulation	30

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT
LIMITED, TRANS-ALASKAN AIRLINES, INC., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

On Petition to Review an Order of the Civil
Aeronautics Board

JOINT APPENDIX

Received July 5, 1960

2 BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

Docket No. 11593

In the Matter of the Application of

GREAT LAKES AIRLINES, INC.

for a Certificate of Public Convenience and Necessity
to Engage in Scheduled Supplemental Air Transportation Pursuant to Section 401(a) of the Federal
Aviation Act of 1958

**Application for Certificate of Public Convenience
and Necessity**

GREAT LAKES AIRLINES, INC. (hereinafter referred to as Applicant) submits this Application under Section 401(a) of the Federal Aviation Act of 1958 and Part 201 of the Board's Economic Regulations and in support thereof respectfully shows and alleges as follows:

I

The full name and address of Applicant is Great Lakes Airlines, Inc., Lockheed Air Terminal, Burbank, California. Applicant is a corporation organized and existing under the laws of the State of New York.

II

Applicant is a citizen of the United States within the meaning of Section 101(13) of the Federal Aviation Act of 1958, in that its President, Secretary-Treasurer and all of its managers, officers and directors are citizens of the United States. The individuals who own and control at least 75 percent of Applicant's stock are also citizens of the United States.

III

Applicant seeks a temporary or permanent Certificate of Public Convenience and Necessity to Engage in Scheduled Supplemental Air Transportation of persons and property as follows: between any point in any state in the United States or in the District of Columbia, and any other point in any state of the United States or in the District of Columbia.

IV

Applicant agrees the Board may impose such reasonable terms, conditions and limitations upon the Certificate of Public Convenience and Necessity issued to Applicant as may be necessary or proper to ensure that the air transportation provided by Applicant is and remains supplemental air transportation, including restrictions on the number of flights which may be performed carrying individually-ticketed passengers.

V

Applicant proposes to use Douglas DC-6B and Douglas DC-4 and other types of modern transport type aircraft in the supplemental air service which Applicant proposes to perform. Applicant is presently the lessee of one Douglas DC-6B aircraft, which Applicant is presently using in the performance of scheduled supplemental air transportation service between various points in the several states of the United States of America. Applicant is also the owner of three Douglas DC-4 transport type aircraft.

VI

Applicant does not presently have a Certificate of Public Convenience and Necessity authorizing it to engage in air transportation. Applicant is currently engaged in non-scheduled and/or supplemental air transportation pursuant to authority granted by Part 291 of the Board's

4 Economic Regulations and Board Order E-9744, dated November 15, 1955. No affiliate, subsidiary or principal stockholder of Applicant is engaged in any form of transportation as a common carrier and as affiliate or subsidy of Applicants is engaged in any phase of aeronautical activity. Nevada Aero Trades Company, a co-partnership composed of the principal stockholders of Applicant, Irving E. Hermann and Ida Mae Hermann, as co-partners, is engaged in the ownership, purchase, sale and lease of aircraft, including transport-type aircraft. The principal stockholders of Applicant, Irving E. Hermann and Ida Mae Hermann, are the principal stockholders of Great Lakes Airlines Maintenance Corp., a corporation engaged in the inspection, maintenance and repair of aircraft and aircraft parts.

VII

All reports due under Part 291 of the Board's Economic Regulations and other reports required by Board regulation to be filed by Applicant have been filed with the Board.

WHEREFORE, Applicant respectfully prays that the Civil Aeronautics Board issue to Applicant a temporary or permanent Certificate of Public Convenience and Necessity to engage in the operations hereinbefore described in this Application.

Respectfully submitted,

GREAT LAKES AIRLINES, INC.

By I. E. HERMANN

I. E. Hermann, *President*

Motion to Dismiss Application

Bureau Counsel moves that the above-entitled application of Great Lakes Airlines, Inc. (applicant) be dismissed. In support of its motion, Bureau Counsel states as follows:

1. The Board, after a full evidentiary hearing, found that applicant was unqualified to receive a certificate of public convenience and necessity as a supplemental air carrier and denied its application.¹ The applicant now seeks the identical authority which was denied by the Board in the above mentioned proceeding. The issues raised by the application have been fully litigated, and a final decision rendered. That decision is *res judicata* as to all matters pleaded in the application. Therefore, the application should be dismissed. To the extent that the application of the principle of *res judicata* may be deemed to rest in the discretion of the Board, it is submitted
 14 that no sound reason has been submitted for exercising such discretion in favor of rehearing a matter which was completely determined in a prior proceeding; nor is Bureau Counsel independently aware of any. Accordingly, the application should be dismissed.

2. The recently enacted legislation² did not grant the applicant the right to re-apply for relief previously denied by the Board. The amendatory legislation was designed to solve, on an interim basis, the problems created by the decision of the Court of Appeals in *United Air Lines, et al. v. Civil Aeronautics Board*, C.A.D.C. No. 15025, *et al.*, opinion issued April 7, 1960. Congress clearly intended thereby to preserve the *status quo ante*. It did not intend to afford carriers already found unfit by the Board another opportunity to re-try their qualifications. This is made abundantly clear by the following colloquy during the debate on the bill in the Senate:

¹ Order E-13436, dated January 29, 1959, *Large Irregular Air Carrier Investigation—Docket 5132, et al.* The applicant petitioned the U. S. Court of Appeals for the District of Columbia for review of Order E-13436, and the Court stayed this order insofar as it operates against applicant's interests. *Great Lakes Airlines, Inc., et al., Petitioners v. Civil Aeronautics Board, Respondents*, No. 15015.

² Public Law 86-661, enacted July 14, 1960, 74 Stat. 527.

"Mr. Engle: There are some carriers [i.e., applicant] such as those mentioned in the final category on page 6 of the Senate Report whose authority was denied under Order E-13436, and who have appealed and are operating under stays by the court. The bill would leave them in *status quo*. Is that correct?

"Mr. Monroney [Chairman, Sub-Committee on Aviation, Committee on Interstate and Foreign Commerce]: In my opinion it affects them in no way. The court has jurisdiction. The matter is before the court and until the court decides, they will continue to operate provided the proposed legislation is passed. . . ."

* * * * *

"Mr. Cannon: The issuance of the certificate now would be almost automatic to all four categories the Senator has mentioned, namely, those that were certificated and operating carriers, those that were certificated but not operating carriers, those that have operated under the Board Order E-9744, on appeal, and those that have applications pending. Is that correct?

- 15 "Mr. Monroney: It is automatic as to the first two, because these are the ones that have been certificated. The others include those that are operating while their cases are on appeal [i.e., applicant]. It is a matter, as to those, for the court. They can be terminated if the court denies the appeal. . . ." (106 Congressional Record, pp. 13430, 13431, June 27, 1960)

To the extent that it may be argued that, notwithstanding the foregoing, Public Law 86-661 nevertheless confers discretionary authority on the Board to entertain the application here involved, there is no showing which would justify favorable action by the Board. For this additional reason, the instant application should be dismissed.

3. Dismissal of the application will not prejudice any rights which applicant may have. The instant application is not necessary in order to protect applicant's rights in the event the Court rules favorably on its petition for review of Order E-13436. In such event, the applicant would be entitled to relief under the amendatory act.

Wherefore, Bureau Counsel moves that the application be dismissed.

Respectfully submitted,

GEORGE N. KENYON, JR.
George N. Kenyon, Jr.
Bureau Counsel

Washington, D. C.
September 15, 1960

31

Received October 3, 1960

Answer of Great Lakes Airlines, Inc. to Motion of Bureau Counsel to Dismiss Application

Great Lakes Airlines, Inc. (Applicant) hereby answers the motion of Bureau Counsel to dismiss the above entitled application. Bureau Counsel's motion is without merit and should be denied for the following reasons:

I

**THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION
TO THE PRESENT CASE**

The doctrine of res judicata does not ordinarily apply to administrative determinations.¹ Even where res

¹ *Pearson v. Williams*, 202 U.S. 281, 26 S. Ct. 608, 50 L. Ed. 1029; *Bridges v. United States*, 199 F. 2d 811 (9th Cir. 1952); *Churchill Tabernacle v. FCC*, 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947); *Niagara Mohawk Power Corp. v. FPC*, 91 U.S. App. D.C. 395, 202 F. 2d 190 (1952), affirmed on other grounds, 347 U.S. 239, 74 S. Ct. 487, 98 L. Ed. 666 (1954); *Jason v. Summerfield*, 94 U.S. App. D.C. 197, 214 F. 2d 273, certiorari denied, 348 U.S. 840, 75 S. Ct. 48, 99 L. Ed. 662 (1954).

judicata is applied in a relaxed or modified form in administrative proceedings, it has no application to a proceeding involving a determination of the present public convenience or necessity with respect to an application pending before an agency.² Bureau Counsel seeks to foreclose inquiry into the question of whether the transportation proposed by Applicant herein is required *now* by the public convenience and necessity. But the
 32 Act requires the Board to consider the public interest, not ignore it.

The Board is required by the Act³ to issue a certificate authorizing the whole or any part of the transportation covered by the application if, among other things, it finds that the proposed transportation is required by the public convenience and necessity. The findings required to be made by the Board under the provisions of Section 401(d)(1) of the Act are findings which must be made by the Board *in this proceeding* after a consideration of the entire record in this proceeding. The doctrine of res judicata may not be used by the Board as a means for avoiding its responsibility to make the findings required by the Act.

Bureau Counsel asserts that Applicant now seeks the identical authority which was denied by the Board in Docket 5132 and that the issues raised by this application have been fully litigated and a final decision rendered. Bureau Counsel fails to support these conclusions with any showing whatever.

It is well established that a party asserting collateral estoppel has the burden of showing an identity of issues.⁴ It is clear that there is no identity of issues between this

² *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F. 2d 289 (3rd Cir. 1956).

³ Section 401(d)(1), *Federal Aviation Act of 1958*.

⁴ *United States v. International Building Co.*, 345 U.S. 502, 73 S. Ct. 807, 97 L. Ed. 1182 (1953).

proceeding and Docket 5132. A comparison of the applications filed by Applicant in this proceeding and Docket 5132 shows that the authority sought in the two proceedings is quite different. As between this case and Docket 5132, there are and will be substantial differences in the facts which the Board will have to consider. Moreover, the records in the two cases will cover different periods of time. The Board's basic premises concerning the type of authority which it believed it could grant the supplemental carriers, and upon which the entire proceeding in Docket 5132 was based, have been radically changed by the decisions of the Court of Appeals reversing the Board's orders in Docket 5132.⁵

As a result of the decisions of the Court of Appeals cited above, all that the Board has done in Docket 5132 with respect to Applicant is to find it unqualified for a certificate which the Board had no authority to grant. The question of the validity of the determination of the qualifications of Applicant with respect to the certificate which the Board had no authority to grant is still in issue before the Court of Appeals.⁶ Applicant has not been found unqualified for any license which the Board had the authority to grant. Neither has Applicant been found unqualified by the Board for its existing authority.

The Board's findings with respect to the qualifications of an applicant before it cannot exist in a vacuum. The findings must relate to the authority which the applicant seeks. When the Board lacks the authority to grant the license applied for, the Board's findings on the qualifications of the applicant for that license are invalid and meaningless.

⁵ *American Airlines v. Civil Aeronautics Board*, 98 U.S. App. D.C. 348, 235 F. 2d 845 (1956); *United Airlines v. Civil Aeronautics Board*, ... U.S. App. D.C., ... F. 2d, ... Cases Nos. 15,025, et al. decided April 7, 1960.

⁶ *Great Lakes Airlines, Inc., et al., v. Civil Aeronautics Board*, United States Court of Appeals for the District of Columbia Circuit, Cases Nos. 15,015, et al.

It is obvious that the authority sought by Applicant in this proceeding is different from the authority the Board thought it had the right to grant in Docket 5132. Applicant is seeking a license which the Board has the authority to grant, not a license which the Court of Appeals has already declared the Board has no authority to grant. That point alone demonstrates that there is no identity of issues between this proceeding and Docket 5132.

The record in Docket 5132 was closed with respect to Applicant in 1956. Since that time Applicant has engaged continually in air transportation in various types of operations.

There have been substantial changes in the financial condition and operations of Applicant.

There have been substantial changes in the personnel employed by Applicant. Applicant will introduce evidence in this proceeding to show that it has the disposition to comply with all of the regulatory requirements and that it is fit, willing, and able to perform the transportation for which it seeks authority. The evidence Applicant will introduce in this proceeding will cover the period from the date when the record was closed with respect to Applicant in Docket 5132 until the present time. The Board has never considered this evidence and, accordingly, res judicata has no application. This evidence must be considered by the Board in this proceeding in order for the Board to make the statutory findings required under Section 401(d)(1) of the Act.

Res judicata has no application to this proceeding for another reason. Only a final decision can be res judicata, and the Board's decision in Docket 5132 is not final. The Board's order in Docket 5132 (E-13436) is not final by its terms with respect to overseas and foreign air transportation. The Board itself has said that the authority in Docket 5132 is nonseverable.⁷ Moreover, the Board's order is not final in Docket 5132 with respect to Applicant for the rea-

⁷ Order No. E-9884, December 29, 1955; Record in Docket 5132, page 49,211.

son that it is still on appeal before the Court of Appeals for the District of Columbia.⁸

The Board denied authority to Applicant in Docket 5132 solely because of alleged violations found by the Board, based upon the record in that proceeding. However, findings of violations in one proceeding do not preclude a finding of qualification in a subsequent proceeding based upon a different record. Applicant does not desire to try again in this proceeding the issues in Docket 5132.⁹ Applicant does intend to litigate in this proceeding the question of its present qualifications for the authority it seeks, based upon a record which will cover the period subsequent to the period covered by the record in Docket 5132.

Under the recently enacted legislation¹⁰ the Board is expressly authorized

“(2) To confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.”

Great Lakes is eligible to be considered under both categories set forth in the quoted provisions of the legislation. It seems clear that the legislative intent was to grant the

⁸ *Great Lakes Airlines, Inc., et al. v. Civil Aeronautics Board*, Cases Nos. 15,015, et al.

⁹ The question of violations was not in issue in Docket 5132. Applicant has raised the question of lack of notice of alleged violations in Docket 5132 in its appeal now pending before the Court of Appeals for the District of Columbia.

¹⁰ *Public Law 86-661*, enacted July 14, 1960, 74 Stat. 527.

Board the power to reconsider all of the applications before it, both old and new, without regard to previous Board action. To dismiss the application herein for the reasons asserted by Bureau Counsel would be both arbitrary and discriminatory.

One further point requires consideration. To the extent that the application herein seeks authority for overseas and intraterritorial operations relating to Hawaii and Alaska, the approval of the President is required for either
 36 the issuance *or denial* of the certificate under the provisions of Section 801 of the Act. A copy of the application must be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board must be submitted to the President before publication thereof. Accordingly, the Board lacks the power to dismiss the application herein in the manner proposed by Bureau Counsel.

For all of the reasons set forth above the doctrine of res judicata is inapplicable to the present proceeding. Bureau Counsel has failed to sustain his burden of showing the applicability of res judicata to this proceeding. Applicant has shown that the doctrine does not apply.

II

APPLICANT IS ENTITLED TO A HEARING ON ITS APPLICATION AS REQUIRED BY LAW

Applicant is entitled to a hearing on its application in accordance with the provisions of Sections 5 and 7 of the Administrative Procedure Act¹¹ and Section 401(c) of the Federal Aviation Act of 1958. Section 401(c) of the Act provides in part as follows:

“Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.”

¹¹ 60 Stat. 239, 5 U.S.C. 1004; 60 Stat. 240, 5 U.S.C. 1005.

Section 401(d)(1) of the Act provides as follows:

“The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.”

37 Applicant is entitled to a hearing on its application for a certificate in this proceeding. A dismissal of its application without hearing would substantially prejudice Applicant by depriving it of a full and fair hearing as guaranteed by the Administrative Procedure Act and the Federal Aviation Act of 1958, and would constitute a denial of due process.

WHEREFORE, the motion of Bureau Counsel to dismiss the application herein should be denied.

Respectfully submitted,

KEATINGE AND OLDER

By CHARLES H. OLDER

Charles H. Older

Attorneys for Applicant

Los Angeles, California
September 28, 1960

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C., on
the 22nd day of November, 1960

Docket 11593

In the matter of the application of

GREAT LAKES AIRLINES, INC.,

for a certificate of public convenience and necessity
to engage in scheduled supplemental air service

Docket 11594

In the matter of the application of

CURREY AIR TRANSPORT, LTD.,

for a certificate of public convenience and necessity
to engage in scheduled supplemental air service

Docket 11595

In the matter of the application of

TRANS-ALASKAN AIRLINES, INC.,

for a certificate of public convenience and necessity
to engage in scheduled supplemental air service

Order Dismissing Applications

By applications filed on July 5, 1960, Great Lakes Airlines, Inc. (Great Lakes), Currey Air Transport, Ltd. (Currey), and Trans-Alaskan Airlines, Inc. (Trans-Alaskan) seek certificates of public convenience and necessity authorizing them to engage in "scheduled supplemental air transportation between any point in any state in the United States or in the District of Columbia, and any

other point in any state of the United States or the District of Columbia.”

Bureau Counsel has filed a motion to dismiss the applications, contending that the Board, after full evidentiary hearings, has only recently found the applicants un-
 58 qualified for authority to engage in such air transportation; that the authority now sought is the same as that already denied; and that the issues raised by these applications are *res judicata*.¹ Apart from the question of the strict applicability of the doctrine of *res judicata*, the Bureau argues that on the basis of these same considerations the Board should, in the exercise of its sound discretion, dismiss the applications. Finally, it contends that Public Law 86-661, viewed most favorably to the applicants, gives the Board the discretionary authority to determine whether it will entertain applications such as these.

The applicants have each filed identical answers to the Bureau's motion. They argue primarily that they are eligible for authorizations under Public Law 86-661; that the doctrine of *res judicata* is inapplicable for a number of reasons; and that the Board has no alternative but to set their applications down for full evidentiary hearings. Since the claim is largely one of eligibility under the mentioned Public Law which is of relatively short duration, it is appropriate for the Board to now act on the contentions presented.

The contentions of the parties have been carefully considered, and the decision is to dismiss the applications. In

¹ The reference is, of course, to Orders E-13436 and E-14449, the final decision on the domestic phases of the *Large Irregular Air Carrier Investigation*, Docket 5132 *et al.* The Board there determined that these three applicants were not qualified for authorizations to engage in supplemental operations because their past serious violations of the Act precluded a finding that they possess the requisite compliance disposition. All three of them have sought judicial review of the Board's denial of their applications in that proceeding. *Great Lakes Airlines, et al. v. Civil Aeronautics Board*, C.A.D.C., Nos. 15,015, *et al.* That case has been argued but the Court has not yet handed down its decision.

reaching this decision, the Board has considered the applications from the standpoint of both Public Law 86-661 and the Federal Aviation Act. In summary, and as hereinafter explained, it is concluded that (1) Public Law 86-661 was not intended to afford a statutory basis for granting applications such as these; (2) wholly apart from this, the Board nevertheless would dismiss them as a matter of administrative discretion; and (3) if they are viewed as filed under Section 401 of the Federal Aviation Act, they likewise would be dismissed as a matter of discretion.

The first question is the applicability of Public Law 86-661. In the final decision on the domestic phases of the *Large Irregular Air Carrier Investigation, supra*, the Board determined, among other things, that under 59 the Federal Aviation Act supplemental air transportation could be authorized by certificates of public convenience and necessity. On appeal by a number of trunkline carriers, however, the United States Court of Appeals for the District of Columbia Circuit disagreed, holding that Section 401(e) of the Act precludes the issuance of such certificates. *United Air Lines, et al. v. Civil Aeronautics Board*, 278 F.2d 446 (April 7, 1960), judgment vacated, — U.S. — (October 24, 1960). It said that the problem was for the Congress. In response thereto, Congress promptly undertook consideration of legislation which would have dealt with the problem on a permanent basis by amending the Federal Aviation Act so as to permit the issuance of certificates for supplemental service. Because of the press of time imposed by the impending adjournment of Congress, it rejected such legislation, substituting therefor Public Law 86-661. The statute is an interim, stop-gap measure, designed to solve the immediate problem created by the *United* decision and at the same time to “give the Congress an opportunity to explore in detail important problems of policy” before undertaking the enactment of permanent legislation. H. Rept. No. 1877, 86th Cong., 2d Sess., p. 2 (June 15, 1960). To this end it au-

thorizes the Board to validate for not more than twenty months the certificates which the Court held invalid in *United*. This provision, of course, has no applicability to Great Lakes, Currey, or Trans-Alaskan. It also authorizes the issuance of interim operating authority of no more than twenty months' duration to a person or carrier which "(A) has operated . . . pursuant to authority granted under Board Order E-9744 . . . or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act." It is not believed that the quoted language (upon which the applicants rely) was intended to apply to the applications here involved. The legislative history shows that the statute was designed (1) to protect those carriers whose applications in the *Large Irregular* case had been deferred pending further proceedings; (2) to permit the Board, if they were otherwise qualified, to confer interim authority upon carriers such as Great Lakes, Currey, and Trans-Alaskan in the event that they should succeed in obtaining a judicial reversal of the Board's prior denial of their applications in the *Large Irregular* case; and (3) to authorize operations by fresh entrants who had already filed applications pursuant to the determination in Order E-13436 that the class of supplemental carriers should remain open for limited entry by persons other than the applicants in the *Large Irregular* case and that persons desiring to enter should file applications for temporary certificates.²

² Thus, in H.R. 7593 as passed by the House, clauses (A) and (B) were joined by the word "and." As thus written, the provision was then designed primarily for the benefit of the first group of carriers referred to in the text, i.e., those whose applications in Docket 5132 were deferred for further consideration by the Board. H. Rept. No. 1877, *supra*, at p. 7. The substitution of the word "or" appears to have been designed to insure that the second and third groups referred to in the text would be eligible, too. As a result of the substitution, those in the second group were clearly covered by clause (A) standing alone. Newcomers "who had never operated under such Board order [E-9744]" were covered by clause (B) standing alone. The first group, of course, was covered regardless of which version was adopted. H.

It is apparent that the applications now under consideration do not come within any of these purposes. Indeed, as is hereinafter spelled out in greater detail, what the applicants seek is, in effect, reconsideration of the prior denial, basing their claim upon the familiar assertion that there have been factual changes since the time the evidentiary record was closed. The Board does not read Public Law 86-661 as having been fashioned as a vehicle for such a proceeding, or to require it to reconsider the numerous denials heretofore made in Docket 5132.

It is recognized that, if literally read, either clause (A) or clause (B), standing alone, would permit the Board to entertain these applications but, for the reasons just expressed, it is believed that such a construction would be inconsistent with the Congressional intent. If that view is erroneous, however, there nevertheless is nothing in the statute or its legislative history which indicates that all applications must be set down for full evidentiary hearing regardless of the circumstances. The statute, both on its face and by its legislative history, shows that the Board was not expected to follow the procedural provisions of Section 401 in all its actions thereunder.³ The Board does not doubt that it may dismiss applications

Rept. No. 2072, 86th Cong., 2d Sess., p. 3 (Conference Report, July 1, 1960). In sum, it is believed that the intent was to preserve the rights of the existing carriers and those new applicants who had by then filed applications, and thus to maintain the *status quo* from the standpoint of existing operators and the disposition of applications by new entrants then on the Board's docket.

³ Contrary to the applicants' contentions, Section 401(c) of the Federal Aviation Act does not stand in the way of such discretionary action. Public Law 86-661 quite clearly was not an amendment of the Federal Aviation Act. On the contrary, it is separate legislation, adopted as a substitute for amendatory legislation.

Somewhat similarly, Section 801 of the Federal Aviation Act does not preclude dismissal insofar as the applications involve Mainland-Alaska and Mainland-Hawaii operations. Apart from the question of technical applicability of Section 801 to cases arising under Public Law 86-661, service from the mainland to Alaska or Hawaii is now "interstate transportation" not falling within the provisions of Section 801.

under Public Law 86-661 as a matter of sound administrative discretion, and in the exercise of such discretion it has concluded that the instant applications should be dismissed. It is unnecessary to determine whether the doctrine of *res judicata*, strictly speaking, is applicable to the issues which these applications raise on the merits. Rather the dismissal on this aspect of the case rests upon the view that an agency, having just completed consideration of a matter, need not immediately thereafter re-entertain a new application for the same authorization.

All three of these applicants were applicants for identical authority in the *Large Irregular* case. That proceeding consumed more than seven years. The transcript of oral testimony alone covers more than 36,000 pages. The exhibits cover 11,000 more. Great Lakes, Currey, and Trans-Alaskan participated fully therein. They had every opportunity to present all material evidence bearing upon their qualifications, including their compliance disposition, as well as full opportunity to rebut adverse evidence introduced by other parties. Based on the record thus developed, the Board found that they had committed willful violations of the Act, that the violations were so serious as to indicate that they could not be trusted to comply with the Act in the future, and hence that they were not qualified for supplemental operating authority.

The question now is whether the Board should go through another full-scale proceeding in order to re-examine their qualifications. On the basis of their present applications, that is not required. Some time has passed since the decision in the *Large Irregular* case, but the passage of
 62 time alone is not determinative.⁴ Rather, the time interval must be considered in the context of the

⁴ The Board is not impressed by the applicants' reference to the passage of time since the closing of the evidentiary record. In July, 1957, they sought a reopening for the purpose of offering more recent evidence as to their qualifications. This was refused because it contained only "general allegations . . . as to improvements in various respects, unsupported by specific

earlier determination. In the case of these applicants, the violations upon which the findings of disqualification were found were extremely serious and of considerable duration. A mere denial that the applicants are now committing the same violations is not enough to require a re-examination. While they now say that there have been "substantial changes" in their financial condition, operations, and employees, and that they will "introduce evidence . . . to show that [each] has the disposition to comply with all of the regulatory requirements and that [each] is fit, willing, and able to perform the transportation for which it seeks authority," this is substantially the same allegation which was made in their motion to reopen the *Large Irregular* case and which was found insufficient. Such allegations no more justify instituting a new proceeding than they did in reopening an existing proceeding.

The applicants appear to rest their right to relief primarily on the provisions of Public Law 86-661. Nevertheless, the applications state on their face that they are filed pursuant to Section 401 of the Federal Aviation Act and, as already noted, they do weave several provisions of that Act into their arguments under Public Law 86-661. Consideration therefore has been given to the motion to dismiss under the Federal Aviation Act as well, and the same conclusion is reached. In the first place, the Court of Appeals has held that certificates for supplemental air transportation cannot be issued under the Federal Aviation Act. Until that question is either mooted by permanent legislation or judicially decided in the Board's favor in the event Congress does not act, it is not believed that, in the light of all the circumstances surrounding the supplemental air carrier

indications of substantial betterment constituting significant change." Order E-11949, November 8, 1957. This view was reaffirmed when reconsideration was denied of the final decision in September, 1959. Order E-14449. In the judicial review proceeding these carriers abandoned their contention that this was an abuse of discretion. Accordingly, there is no basis for a contention that there would be any point in holding hearings with respect to the interval between the time the evidentiary record was closed and the time of our final decision.

problem, the Board should undertake to issue certificates which the Court of Appeals has said are beyond the scope of the Act.⁵ Apart from this, the Board does not interpret Section 401(c) of the Federal Aviation Act as requiring the processing of all certificate applications regardless of the circumstances in which they are filed. Rather, the Board believes that it has discretionary authority to dismiss certificate applications in appropriate cases. The circumstances under which these applications are presented are appropriate for dismissal. Hence, if these applications are viewed as having been filed under Section 401, they would be dismissed for the same reasons that impel dismissal under Public Law 86-661 if that law is deemed to extend to the present applications.⁶

⁶ The action taken in this aspect of the case does not constitute any permanent barrier to the filing of applications by these carriers, but rather is a holding that, in all of the circumstances presented, the Board need not now entertain their applications pursuant to Section 401.

Upon the basis of all of the foregoing considerations,

IT IS ORDERED, That the applications of Great Lakes, Currey, and Trans-Alaskan in Dockets 11593, 11594, and 11595, respectively, be and they hereby are dismissed.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER
Robert C. Lester
Secretary

(SEAL)

⁵ On October 24, 1960, the Supreme Court granted a petition for certiorari filed in the *United* case by the supplemental carriers whose certificates had been held invalid. The Court vacated the judgment below and remanded the case to the Court of Appeals with directions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86-661 has expired. This is not regarded as affording any basis for awarding new certificates pursuant to the Federal Aviation Act. The Supreme Court has not passed on the merits of the question of the Board's power to issue certificates. Rather, it has recognized that Public Law 86-661 removed any immediate need for its consideration of the question, and has provided a means whereby the question can be further litigated in the event that the controversy revives through failure of Congress to take permanent action prior to the expiration of the interim legislation.

Filed December 6, 1960

**Petition for Reconsideration of Board Order No. E-16050 Dated
November 22, 1960**

Great Lakes Airlines, Inc. ("petitioner") hereby respectfully petitions the Board to reconsider Order No. E-16050 dated November 22, 1960, upon each and all of the following grounds:

I

By the subject Order the Board dismissed the application of petitioner for a certificate of public convenience and necessity to engage in scheduled supplemental air service pursuant to Section 401(a) of the Federal Aviation Act of 1958. In dismissing the application the Board concluded that (1) Public Law 86-661 was not intended to afford a statutory basis for granting an application such as the one filed herein; (2) the Board nevertheless would dismiss the subject application as a matter of administrative discretion; and (3) if the application is viewed as filed under Section 401 of the Federal Aviation Act, it likewise would be dismissed as a matter of discretion. Petitioner respectfully requests the Board to reconsider Order No. E-16050 for the reasons that the Board's dismissal of petitioner's application herein is contrary to the Federal
66 Aviation Act of 1958 and the Board's regulations thereunder, Public Law 86-661, the Administrative Procedure Act, and constitutes a denial of due process as to petitioner for the reasons set forth hereafter in this petition.

II

In the subject Order the Board states in substance that petitioner appears to rest its right to relief primarily on the provisions of Public Law 86-661. How the Board was able to arrive at this conclusion is difficult to understand. The application states on its face that it is an application for a certificate to engage in scheduled supplemental air

transportation pursuant to Section 401(a) of the Federal Aviation Act of 1958. Petitioner believes that the Board has misconstrued the effect of Public Law 86-661 as well as its own power to dispose of an application for a certificate filed pursuant to the provisions of Section 401 of the Act.

III

The Board concedes in its Order that Public Law 86-661, if literally read, permits the Board to entertain the subject application. Petitioner submits that the literal meaning of the statute is the correct one and that the Board's interpretation is strained and contrary to the intent of Congress. The Board asserts that Public Law 86-661 shows that the Board was not expected to follow the procedural provisions of Section 401 of the Act. This conclusion is unsupported by law or reason. Whether Public Law 86-661 in fact amends Section 401 of the Act or is merely a substitute for amendatory legislation as the Board suggests,¹ it is clear that the effect of Public Law 86-661 is merely to modify

67 Section 401 of the Act so as to permit the Board to issue valid certificates in the form in which the Board issued them pursuant to Order No. E-13436 in Docket 5132. This is necessarily true, since otherwise certificates issued by the Board in such form would be invalid, as the Court of Appeals has already determined.

Public Law 86-661 does not purport to dispense with the procedural requirements of Section 401 of the Act. It merely suspends for a period of twenty months certain of the provisions of Section 401 which would otherwise prevent the Board from lawfully issuing certificates in the same form as those issued pursuant to Order No. E-13436.

Although the Board states that it has the administrative discretion to dismiss the application under Public Law 86-661, no authority is cited in support of this conclusion.

¹ Bureau Counsel refers to Public Law 86-661 as the "amendatory act" in the motion to dismiss petitioner's application herein.

Petitioner will show hereinafter in this petition that the Courts have held that an administrative agency has no such discretion as the Board contends it has in this proceeding.

IV

The Board asserts in the subject Order that it is not necessary to determine whether the doctrine of res judicata applies to the instant case because the Board need not immediately re-entertain a new application for the same authorization. If the doctrine of res judicata does not apply to this case, and petitioner contends that it does not for the reasons set forth in its answer to Bureau Counsel's motion to dismiss the application, then the Board's dismissal of the application without complying with the procedural provisions of Section 401 of the Act and the applicable provisions of the Administrative Procedure Act is clearly an abuse of discretion, is arbitrary and discriminatory, and amounts to a denial of due process as to petitioner. The doctrine of res judicata is not applicable to this proceeding. Bureau Counsel failed to offer any support whatever for the bare conclusion that the doctrine is applicable and the Board has not offered one reason in support of the application of the doctrine in this case. This is understandable, since both the facts and the law show that the doctrine has no application to this proceeding. The reasons and authorities are set forth in petitioner's answer to Bureau Counsel's motion to dismiss this application.

The Board's decision in Docket 5132 (Opinion and Order No. E-13436) was issued in January, 1959, considerably over a year and a half ago. The record in Docket 5132 with respect to applicant's case was closed in 1956, almost four years ago. A substantial portion of the evidence relating to applicant in Docket 5132 is considerably older than that. The findings made by the Board with respect to applicant in Docket 5132 were made without notice to

applicant of the alleged violations upon which the findings were based, and in view of the decision of the Court of Appeals with respect to Order No. E-13436, the Board's findings amount to no more than a determination that petitioner was unqualified for a certificate which the Board had no authority to issue. The Board cannot lawfully refuse to consider new evidence of fitness of an applicant on the ground that the applicant has at some time in the past been guilty of conduct showing unfitness.²

In this proceeding petitioner seeks authority of an entirely different nature than that asked for by petitioner in its applications filed in Docket 5132. The record in this proceeding would consist of evidence which has never been before the Board and would cover a substantial period of time not covered by the record in Docket 5132.

69

V

The Board asserts in the subject Order that it lacks the power to issue certificates under Section 401 of the Act because of the decision of the Court of Appeals with respect to Order No. E-13436. The Board's conclusion in this respect fails to find support in the Court's decision. The decision of the Court of Appeals does not prohibit the Board from issuing certificates for supplemental service under Section 401 of the Act, except for the reasons specified in the Court's decision. Petitioner does not seek a certificate in this proceeding which the Board cannot lawfully issue. On the contrary petitioner seeks a certificate which the Board has the power to issue under Section 401 of the Act as modified by Public Law 86-661.

VI

The Board states in the subject Order that it has the administrative discretion to dismiss the subject application under Section 401 of the Act without complying with the

² See *Minkoff v. Payne*, 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953).

procedural requirements of that section. The Board significantly fails to cite a single authority in support of this conclusion. The reason for this failure is obvious. There is a substantial body of authority to the contrary. Both the provisions of Section 401 of the Act and of the Administrative Procedure Act are mandatory with respect to the hearing required in a licensing proceeding.

Section 401(c) of the Act provides as follows:

"Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the Secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or a memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible."

70 Section 401(d)(1) of the Act provides as follows:

"The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; *otherwise such application shall be denied.*" (emphasis added).

It is apparent from the quoted section that the application may be denied only if the Board is unable to make the findings required to be made by the statute on the record after a hearing for the issuance of a certificate. There is no provision in the Federal Aviation Act of 1958, the Board's regulations, the Administrative Procedure Act,

or Public Law 86-661, which gives the Board any administrative discretion to dismiss the application in the manner in which it was done herein.³

On the contrary the Courts have said that an administrative agency may not do what the Board has done in this proceeding.⁴ In the *Goldsmith* case the Court states (270 U.S. at page 123):

71 " . . . We think that the petitioner having shown by his application that being a citizen of the United States and a certified public accountant under the laws of the state, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that 'The board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for applicant as would constitute due process."

In second *Carter* the Court states (192 F. 2d at page 15):

" . . . We do not imply that in our opinion a purely administrative refusal to renew, or to grant, a license to do a lawful business could be supported if based on arbitrary grounds or made without such a 'hearing and opportunity to answer * * * as would constitute due process.' "

³ See Sections 5, 7, 8, 9(b) and 10(e) of the Administrative Procedure Act.

⁴ *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d (1957); *Columbia Auto Loan v. Jordan*, 90 U.S. App. D.C. 222, 196 F. 2d 568 (1952); *Minkoff v. Payne*, 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953); *In re Carter*, 85 U.S. App. D.C. 229, 177 F. 2d 75, certiorari denied sub nom. *Laws v. Carter*, 338 U.S. 900, 70 S. Ct. 250, 94 L. Ed. 534 (1949); *Id.*, 89 U.S. App. D.C. 310, 192 F. 2d 15, certiorari denied, 342 U.S. 862, 72 S. Ct. 89, 96 L. Ed. 648 (1951).

Under the cases cited the Board has no administrative discretion to dismiss an application under Section 401 without affording the applicant the procedural safeguards required by that section, including an evidentiary hearing.

WHEREFORE, petitioner prays that the Board reconsider Order No. E-16050, reinstate petitioner's application for a certificate herein, and set the matter down for hearing in accordance with the provisions of Section 401 of the Act.

Respectfully submitted,

KEATINGE AND OLDER

By CHARLES H. OLDER

Charles H. Older

Attorneys for Petitioner

December 5, 1960

91

Order No. E-16140

Order Denying Petitions for Reconsideration

Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Trans-Alaskan Airlines, Inc., have filed petitions for reconsideration of Board Order E-16050, dated November 22, 1960, in which the Board dismissed their applications for certificates of public convenience and necessity to engage in scheduled supplemental air transportation. Upon consideration of the contentions advanced in the petitions, the Board finds that they do not establish error in the Board's decision or otherwise warrant granting the relief requested.

92 ACCORDINGLY, IT IS ORDERED: That the petitions for reconsideration herein be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER

Robert C. Lester

Secretary

(SEAL)

Filed February 10, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 16,165

GREAT LAKES AIRLINES, INC., ET AL., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

Before: Danaher, Circuit Judge.

Prehearing Order

On consideration of the matters transpiring at the prehearing conference held herein on February 9, 1961, pursuant to Rule 38(k) of the General Rules of this Court, and of the annexed prehearing conference stipulation submitted by counsel for the parties, which defines the issues and provides for the content of the joint appendix, and of the representations of counsel as to the time needed for the filing of the briefs and the joint appendix of the parties, and the agreement of counsel to accommodate themselves to the schedule hereinafter prescribed, it is

ORDERED that the aforesaid stipulation is hereby approved, and that the times for filing the briefs and the joint appendix is fixed as follows:

Petitioners' brief, in typewritten or mimeograph form, and the joint appendix of the parties shall be served and filed on or before March 15, 1961, the printed brief to be filed within ten days thereafter.

Respondent's brief, in typewritten or mimeograph form, shall be served and filed on or before April 7, 1961, the printed brief to be filed within ten days thereafter.

Petitioners' reply brief, if any, in typewritten or mimeograph form, shall be served and filed on or before April 17, 1961.

It is

FURTHER ORDERED that the aforesaid stipulation and this order shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix.

Dated: February 10, 1961

Prehearing Conference Stipulation

Petitioners seek review of Civil Aeronautics Board Order E-16050 which dismissed their applications for certificates of public convenience and necessity to engage in supplemental air transportation.

Petitioners and respondent, subject to the approval of the Court, hereby stipulate and agree as follows with respect to the issues, the contents of the joint appendix, and the procedure and dates for the filing of the briefs and joint appendix herein.

I

Issues

Petitioners' issues are as follows:

1. Whether the Board erred in dismissing their applications for certificates of public convenience and necessity to engage in scheduled supplemental air transportation without granting petitioners a hearing.

2. Whether the Board erred in dismissing their applications without making the findings required by law.

Petitioners and respondent reserve the right to rephrase the stated issues in terms of subordinate ones, and respond-

ent reserves the right to take the position that any grounds of error urged by petitioner is irrelevant or not properly in issue.

II

Content of Joint Appendix

The transcript of record herein consists of substantially identical documents relating to each separate individual application filed with the Board. The parties agree that the materials relating to one application are representative of all such materials, and that the joint appendix to briefs (to be printed by petitioners) shall consist of the following:

- (1) Application of Great Lakes Airlines for certificate of public convenience and necessity;
- (2) Motion of Bureau Counsel to dismiss such application;
- (3) Answer of Great Lakes Airlines to motion of Bureau Counsel to dismiss its application;
- (4) Board Order E-16050, dismissing applications;
- (5) Petition of Great Lakes for reconsideration of Board Order E-16050;
- (6) Board Order E-16140, denying petitions for reconsideration;
- (7) This stipulation and the order of the Court approving the stipulation.

III

Filing Dates for Briefs and Joint Appendix

The time for the filing of briefs and the joint appendix shall be as follows:

1. Petitioners' brief, together with the joint appendix, will be served and filed on or before , 1961.

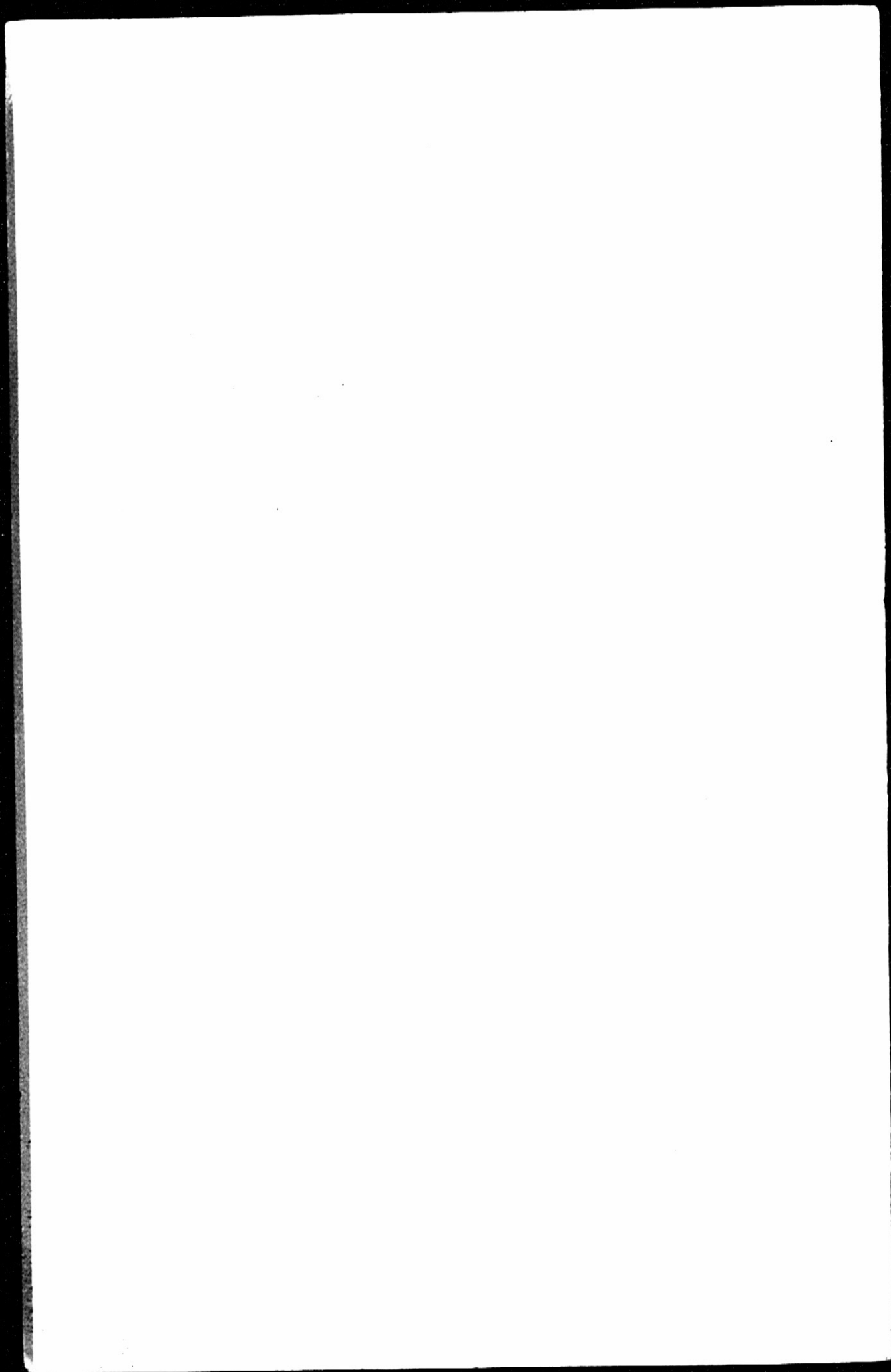
2. Respondent's brief will be served and filed on or before _____, 1961.

3. Petitioners' reply brief, if any, will be served and filed on or before _____, 1961.

CHARLES H. OLDER
Counsel for Petitioners

FRANKLIN M. STONE
Counsel for Respondent

Dated: February _____, 1961



BRIEF FOR PETITIONERS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT LIMITED,
TRANS-ALASKAN AIRLINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition to Review an Order of the
Civil Aeronautics Board

CHARLES H. OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

DAYTON M. HARRINGTON
454 Washington Building
Washington 5, D.C.

Attorneys for Petitioners

KEATINGE AND OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

Of Counsel

Dated: March 14, 1961

United States Court of Appeals
For the
District of Columbia Circuit

FILED

MAR 14 1961

Joseph W. Stewart

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C. CLERK

STATEMENT OF QUESTIONS PRESENTED

1. May the Civil Aeronautics Board dismiss an application for a certificate of public convenience and necessity to engage in supplemental air transportation without granting the hearing provided for in the Federal Aviation Act of 1958 and the Administrative Procedure Act, on the basis of a finding by the Board in another proceeding, based upon evidence six to eight years old at the time such finding was made, that the applicant was unqualified for a certificate?

2. May the Civil Aeronautics Board dismiss an application for a certificate to engage in supplemental air transportation, in a proceeding where the Board refused to receive any evidence, without making findings to support the order of dismissal based upon substantial evidence in an evidentiary record in the proceeding?

INDEX

	Page
STATEMENT OF QUESTIONS PRESENTED.	
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
RELEVANT STATUTES	4
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. THE BOARD ERRED IN DISMISSING PETITIONERS' AP- PLICATIONS FOR CERTIFICATES OF PUBLIC CONVEN- IENCE AND NECESSITY WITHOUT GRANTING TO PETI- TIONERS A HEARING	5
A. Petitioners are entitled to an adjudicatory hearing on their applications	5
B. The Board lacks administrative discretion to dismiss an application for a certificate with- out granting a hearing	8
C. The Board lacks administrative discretion un- der Public Law 86-661 to dismiss the applica- tions without a hearing	13
II. THE BOARD ERRED IN DISMISSING PETITIONERS' AP- PLICATIONS FOR CERTIFICATES OF PUBLIC CONVEN- IENCE AND NECESSITY WITHOUT MAKING FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE IN AN EVI- DENTIARY RECORD CONSIDERED AS A WHOLE IN THIS PROCEEDING	15
CONCLUSION	19
APPENDIX	21

TABLE OF AUTHORITIES

CASES:	Page
<i>American Airlines v. Civil Aeronautics Board</i> , 98 U.S. App. D.C. 348, 235 F. 2d 845	3
* <i>American Airlines v. Civil Aeronautics Board</i> , 89 U.S. App. D.C. 365, 192 F. 2d 417	11
<i>Boudin v. Dulles</i> , 98 U.S. App. D.C. 305, 235 F. 2d 532	17
* <i>Continental Southern Lines v. Civil Aeronautics Board</i> , 90 U.S. App. D.C. 352, 197 F. 2d 397, cert. den. 344 U.S. 831, 73 S. Ct. 37, 97 L. Ed 647	11
* <i>Goldsmith v. United States Board of Tax Appeals</i> , 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494	8
* <i>Great Lakes Airlines, Inc. v. Civil Aeronautics Board</i> (No. 15,015, et al.), U.S. App. D.C. , F. 2d (1961)	3, 10, 11
<i>Greensboro-High Point Airport Authority v. Civil Aeronautics Board</i> , 97 U.S. App. D.C. 358, 231 F. 2d 517	17
* <i>In Re Carter</i> , 85 U.S. App. D.C. 229, 177 F. 2d 75, cert. den. sub nom, <i>Laws v. Carter</i> , 338 U.S. 900, 70 S. Ct. 250, 94 L. Ed. 554 (1949)	8
* <i>In Re Carter</i> , 89 U.S. App. D.C. 310, 192 F. 2d 15, cert. den.; 342 U.S. 862, 72 S. Ct. 89, 96 L. Ed. 648 (1951)	8, 19, 20
* <i>In Re United Corporation</i> , 249 F. 2d 168 (CA 3) ..	17, 18
* <i>Jordan v. American Eagle Fire Ins. Co.</i> , 83 U.S. App. D.C. 192, 169 F. 2d 281	17
* <i>L.A. Tucker Truck Lines v. United States</i> , D.C.E.D. Mo., 100 F. Supp. 432	7
* <i>Minkoff v. Payne</i> , 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953)	12
<i>Morgan v. United States</i> , 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288	8
<i>Morgan v. United States</i> , 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129	8
* <i>Pinkett v. United States</i> , 105 F. Supp. 67 (1952, DC Md.)	6
* <i>Riss & Co. v. United States</i> , (1950, DC Mo.) 96 F. Supp. 452, reversed per curiam in 341 U.S. 907, 71 S. Ct. 620, 95 L. Ed. 1345	6

* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
<i>Schware v. Board of Bar Examiners</i> , 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796	12
* <i>Securities and Exchange Commission v. Chenery Corp.</i> , 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626	17
* <i>United Air Lines v. Civil Aeronautics Board</i> , U.S. App. D.C. , 278 F. 2d 446, judgment vacated U.S. , S. Ct. , L. Ed. 2d (October 24, 1960)	3, 4, 9, 10, 12, 13, 14
* <i>United States v. L.A. Tucker Truck Lines</i> , 344 U.S. 33, 73 S. Ct. 67, 97 L. Ed. 54	7
* <i>Universal Camera Corp. v. N.L.R.B.</i> , 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456	17
* <i>Wong Yang Sung v. McGrath</i> , (1950) 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616	6, 7
* <i>Zenith Radio Corp. v. Federal Communications Com- mission</i> , 93 U.S. App. D.C. 284, 211 F. 2d 629	6

STATUTES:

Administrative Procedure Act:

*Section 2(d)	7
*Section 2(e)	7
*Section 5	5, 6, 7, 8
*Section 7	5, 7, 8
*Section 7(c)	15
*Section 8	5, 7, 8
*Section 8(b)	15
*Section 9(b)	5, 7, 8
*Section 10	2
*Section 10(e)	16
*Section 12	14

Federal Aviation Act of 1958:

Section 2	11
*Section 401	2, 5, 9, 13, 14
*Section 401(c)	5, 7, 8
*Section 1005(f)	15
Section 1006	2
* <i>Public Law 86-661</i>	2, 3, 4, 5, 9, 13, 14, 15

Communications Act:

Section 309	6
-------------------	---

* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
CIVIL AERONAUTICS BOARD REGULATIONS:	
<i>Economic Regulations:</i>	
Part 291	3
<i>Procedural Rules:</i>	
Section 302.1(a)	6
Section 302.27	6
Section 302.28	6
Section 302.29	6
Section 302.30	6
Section 302.36	6

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT LIMITED,
TRANS-ALASKAN AIRLINES, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

On Petition to Review an Order of the
Civil Aeronautics Board

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Petitioners ask this Court to review and set aside an order¹ of the Civil Aeronautics Board² dismissing petitioners' applications for certificates of public convenience and necessity to engage in scheduled supplemental air transportation. The said order adversely affects petitioners.

¹ Order No. E-16050, adopted November 22, 1960 [J.A. 14].

² Sometimes hereinafter called "the Board."

Jurisdiction here rests on Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. Section 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Section 1009. The Board's order was issued on November 22, 1960, and the petition for review was filed in this Court on January 16, 1961.

STATEMENT OF THE CASE

Petitioners ask this Court to set aside the order of the Board that

(i) Arbitrarily dismisses petitioners applications for certificates of public convenience and necessity to engage in scheduled supplemental air transportation without granting to petitioners a hearing, and is not supported by findings based upon substantial evidence of record in this proceeding;

(ii) Ignores the requirements of due process of law; and

(iii) Violates the Federal Aviation Act of 1958, the Administrative Procedure Act, Public Law 86-661, and the Board's Procedural Regulations.

The Board has based its order dismissing the applications on the grounds that (1) Public Law 86-661³ was not intended to afford a statutory basis for granting applications such as petitioners filed herein; (2) wholly apart from that, the Board nevertheless would dismiss them as a matter of administrative discretion; and (3) if they are viewed as filed under Section 401 of the Federal Aviation Act,⁴ they likewise would be dismissed as a matter of discretion.⁵

³ Public Law 86-661, 74 Stat. 527, enacted July 14, 1960.

⁴ 49 U.S.C. Sec. 1371; 72 Stat. 754.

⁵ Board Order No. E-16050 [J.A. 14].

Petitioners are air carriers and have been operating for many years.⁶ Petitioners are presently operating pursuant to an "Interim Operating Authorization" issued by the Board in the *Large Irregular Air Carrier Investigation*, Docket 5132, et al.,⁷ and Part 291 of the Board's Economic Regulations. Order No. E-9744 was set aside by this Court,⁸ but the Court's mandate has been stayed. In the Board's 1959 order in the *Large Irregular* case, petitioners were found unqualified for authority because they lacked compliance disposition and their existing authority was revoked.⁹ This Court also set aside the Board's 1959 order, insofar as it granted certificates to certain of the applicants therein.¹⁰ Petitioners sought review in this Court of the Board's order (E-13436) finding them unqualified, and the order was stayed pending review. In February, 1961, this Court (in a 2-1 decision) affirmed the Board's order finding petitioners unqualified and revoking their existing authority.¹¹ Petitioners have filed a petition for rehearing in that case which is now pending before this Court.

Following this Court's reversal of the Board's 1959 order, Congress undertook consideration of legislation dealing with the problems created by that decision relating to the supplemental air carriers. On July 14, 1960, Congress enacted Public Law 86-661.¹²

⁶ Great Lakes has been operating since 1946. Currey and Trans-Alaskan have been operating since 1947.

⁷ Board Order No. E-9744, adopted November 15, 1955.

⁸ *American Airlines v. Civil Aeronautics Board*, 98 U.S. App. D.C. 348, 235 F. 2d 845.

⁹ Board Order No. E-13436, adopted January 28, 1959.

¹⁰ *United Air Lines v. Civil Aeronautics Board*, ... U.S. App. D.C., 278 F. 2d 446, judgment vacated U.S., ... S. Ct., ... L. Ed. 2d (October 24, 1960).

¹¹ *Great Lakes Airlines, Inc. v. Civil Aeronautics Board*, (No. 15,015, et al.), ... U.S. App. D.C., ... F. 2d (1961).

¹² Public Law 86-661, 74 Stat. 527, enacted July 14, 1960.

Jurisdiction here rests on Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. Section 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Section 1009. The Board's order was issued on November 22, 1960, and the petition for review was filed in this Court on January 16, 1961.

STATEMENT OF THE CASE

Petitioners ask this Court to set aside the order of the Board that

(i) Arbitrarily dismisses petitioners applications for certificates of public convenience and necessity to engage in scheduled supplemental air transportation without granting to petitioners a hearing, and is not supported by findings based upon substantial evidence of record in this proceeding;

(ii) Ignores the requirements of due process of law; and

(iii) Violates the Federal Aviation Act of 1958, the Administrative Procedure Act, Public Law 86-661, and the Board's Procedural Regulations.

The Board has based its order dismissing the applications on the grounds that (1) Public Law 86-661³ was not intended to afford a statutory basis for granting applications such as petitioners filed herein; (2) wholly apart from that, the Board nevertheless would dismiss them as a matter of administrative discretion; and (3) if they are viewed as filed under Section 401 of the Federal Aviation Act,⁴ they likewise would be dismissed as a matter of discretion.⁵

³ Public Law 86-661, 74 Stat. 527, enacted July 14, 1960.

⁴ 49 U.S.C. Sec. 1371; 72 Stat. 754.

⁵ Board Order No. E-16050 [J.A. 14].

Petitioners are air carriers and have been operating for many years.⁶ Petitioners are presently operating pursuant to an "Interim Operating Authorization" issued by the Board in the *Large Irregular Air Carrier Investigation*, Docket 5132, et al.,⁷ and Part 291 of the Board's Economic Regulations. Order No. E-9744 was set aside by this Court,⁸ but the Court's mandate has been stayed. In the Board's 1959 order in the *Large Irregular* case, petitioners were found unqualified for authority because they lacked compliance disposition and their existing authority was revoked.⁹ This Court also set aside the Board's 1959 order, insofar as it granted certificates to certain of the applicants therein.¹⁰ Petitioners sought review in this Court of the Board's order (E-13436) finding them unqualified, and the order was stayed pending review. In February, 1961, this Court (in a 2-1 decision) affirmed the Board's order finding petitioners unqualified and revoking their existing authority.¹¹ Petitioners have filed a petition for rehearing in that case which is now pending before this Court.

Following this Court's reversal of the Board's 1959 order, Congress undertook consideration of legislation dealing with the problems created by that decision relating to the supplemental air carriers. On July 14, 1960, Congress enacted Public Law 86-661.¹²

⁶ Great Lakes has been operating since 1946. Currey and Trans-Alaskan have been operating since 1947.

⁷ Board Order No. E-9744, adopted November 15, 1955.

⁸ *American Airlines v. Civil Aeronautics Board*, 98 U.S. App. D.C. 348, 235 F. 2d 845.

⁹ Board Order No. E-13436, adopted January 28, 1959.

¹⁰ *United Air Lines v. Civil Aeronautics Board*, ... U.S. App. D.C., 278 F. 2d 446, judgment vacated U.S., ... S. Ct., ... L. Ed. 2d (October 24, 1960).

¹¹ *Great Lakes Airlines, Inc. v. Civil Aeronautics Board*, (No. 15,015, et al.), ... U.S. App. D.C., ... F. 2d (1961).

¹² Public Law 86-661, 74 Stat. 527, enacted July 14, 1960.

Public Law 86-661 authorizes the Board to validate for not more than twenty months the certificates which this Court held invalid in the *United Air Lines* decision, *supra*, and to issue interim operating authority for not more than twenty months to a person or carrier which "(A) has operated . . . pursuant to authority granted under Board Order E-9744 . . . or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act."

Petitioners filed their applications for certificates, dismissed by the Board's order under review herein, in July, 1960, prior to the enactment of Public Law 86-661. Following the Board's dismissal of their applications petitioners filed petitions for reconsideration of the order under review.¹³ The Board denied reconsideration¹⁴ and petitioners sought review in this Court.

RELEVANT STATUTES

The pertinent provisions of the Federal Aviation Act of 1958, the Administrative Procedure Act, Public Law 86-661, and the Board's Procedural Regulations, to which references are made, are set forth in the Appendix to this brief.

STATEMENT OF POINTS

1. The Board erred in dismissing petitioners' applications for certificates of public convenience and necessity without granting to petitioners a hearing.

2. The Board erred in dismissing petitioners applications for certificates of public convenience and necessity without making findings supported by substantial evidence in an evidentiary record in this proceeding considered as a whole.

¹³ [J.A. 22].

¹⁴ Order No. E-16140, adopted December 15, 1960 [J.A. 28].

SUMMARY OF ARGUMENT

Petitioners, upon filing applications with the Board for certificates under Section 401 of the Federal Aviation Act, were entitled to an adjudicatory hearing under the provisions of that Act, the Administrative Procedure Act, and the Board's Procedural Regulations.

Public Law 86-661 does not give the Board the administrative discretion to eliminate the procedural requirements of either the Federal Aviation Act or the Administrative Procedure Act, but does permit the Board to issue certificates (for a period of twenty months) in a form which would otherwise be invalid under Section 401 of the Act.

The Board's order under review is invalid because petitioners were denied the adjudicatory hearing to which they were entitled. Moreover, the Board failed to make findings to support the order based upon substantial evidence in an evidentiary record in this proceeding. Because the Board refused to receive any evidence in this proceeding, there is no record for a reviewing court to review. Accordingly, there is no basis upon which the Court may affirm the Board's order and it must be reversed.

ARGUMENT

I

THE BOARD ERRED IN DISMISSING PETITIONERS' APPLICATIONS FOR
CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY WITHOUT
GRANTING TO PETITIONERS A HEARING

A. Petitioners Are Entitled to an Adjudicatory Hearing on Their Applications.

The right to a hearing is expressly granted to petitioners by Section 401(c) of the Federal Aviation Act of 1958,¹⁵ and by Sections 5, 7, 8 and 9 (b) of the Administrative Procedure Act.¹⁶ Hearings are also provided for in the

¹⁵ 49 U.S.C., Sec. 1371(c).

¹⁶ 5 U.S.C., Secs. 1004, 1006, 1007, and 1008(b); 60 Stat. 239, 241, 242.

Board's Procedural Regulations.¹⁷ The Board's order under review is in conflict with an impressive array of statutory and judicial authority. In *Riss & Co. v. United States*,¹⁸ the lower Court held that in proceedings before the Interstate Commerce Commission for a certificate, a hearing was not required either by statute or due process. The Supreme Court reversed on the authority of *Wong Yang Sung v. McGrath*.¹⁹ In *Zenith Radio Corp. v. Federal Communications Commission*, 93 U.S. App. D.C. 284, 211 F. 2d 629, this Court held that Zenith was entitled to an adjudicatory hearing on its application for commercial operation on a television channel brought pursuant to Section 309 of the Communications Act.²⁰ In speaking of the applicant's right to a hearing under the statute, this Court, speaking through Judge Prettyman, said [211 F. 2d 634]:

"Such an established statutory right requires adjudicatory disposition, and the procedure which is sufficient for rule-making is not sufficient for that purpose."

In *Pinkett v. United States*, 105 F. Supp. 67 (1952, DC Md.), the Court held that a determination by the Interstate Commerce Commission upon an application for a certificate is an adjudication required by statute to be determined on the record after opportunity for an agency hearing within the meaning of Section 5 of the Administrative Procedure Act and that the procedural requirements of Section 5 are applicable in such proceedings. In discussing

¹⁷ Part 302 of the Board's Economic Regulations, Secs. 302.1(a), 302.27, 302.28, 302.29, 302.30, 302.36; 14 CFR 302.1(a), 302.26, 302.27(a)(1)(2)(3), 302.28, 302.29, 302.30, 302.33, 302.36.

¹⁸ [1950, DC Mo.] 96 F. Supp. 452, reversed per curiam in 341 U.S. 907, 71 S.Ct. 620, 95 L. Ed. 1345, on the authority of *Wong Yang Sung v. McGrath* (1950) 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616.

¹⁹ Cited in footnote 18.

²⁰ 48 Stat. 1085 (1934) as amended, 47 U.S.C.A., Sec. 309.

the defects in the Commission's procedure, the Court stated [105 F. Supp. 73]:

"Moreover we are in accord with the conclusion of the Court in *L. A. Tucker Truck Lines v. United States*, D.C.E.D. Mo., 100 F. Supp. 432, now on appeal to the Supreme Court of the United States, that the failure of an administrative agency to hold a hearing in accordance with the provisions of the Administrative Procedure Act is a defect which invalidates the whole proceeding and may not be waived."

And, in *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 73 S. Ct. 67, 97 L. Ed. 54, the Supreme Court held that a defect under the Administrative Procedure Act in the appointment of an examiner was an irregularity which would invalidate a resulting order if objection had been raised at the proper time and overruled by the Commission. The Court discusses *Wong Yang Sung v. McGrath*, supra, but states that the question of the timeliness of an objection to the proceeding or of a defect therein was not considered in *Wong Yang Sung*, and for that reason that case is not a precedent on this point. In the instant case petitioners did raise objections to the Board's denial of a hearing and its failure to make findings based upon substantial evidence in the record, both in their answer to Bureau Counsel's motion to dismiss the application²¹ and in their petition for reconsideration of the Board's order under review.²²

It is clear that the hearing required to be held under Section 401(c) of the Act falls within the provisions of Sections 5, 7, 8 and 9(b) of the Administrative Procedure Act. Under Sections 2(d) and 2(e) of the Administrative Procedure Act,²³ the Board's disposition (whether affirmative, negative, injunctive, or declaratory in form) of petitioners'

²¹ [J.A. 4].

²² [J.A. 22].

²³ 5 U.S.C. Sec. 1001(d) and (e); 60 Stat. 237.

applications for certificates amounts to "adjudication." Since Section 401(c) of the Act requires a hearing in connection with an application for a certificate, the provisions of Sections 5, 7, 8 and 9(b) of the Administrative Procedure Act apply by the express wording of the first sentence in Section 5 . . . "Sec. 5 In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .".

In dismissing petitioners' applications, the Board has ignored the plain statutory requirements of the Federal Aviation Act and the Administrative Procedure Act, as well as its own procedural regulations, and has denied petitioners the procedural rights guaranteed to them by those statutes.²⁴

B. The Board Lacks Administrative Discretion to Dismiss an Application for a Certificate Without Granting a Hearing.

In the order under review the Board states:²⁵

"The Board does not doubt that it may dismiss applications under Public Law 86-661 as a matter of sound administrative discretion, and in the exercise of such discretion it has concluded that the instant applications should be dismissed . . . Rather the dismissal on this aspect of the case rests upon the view that an agency, having just completed consideration of a matter, need not immediately thereafter re-entertain a new application for the same authorization."

²⁴ On the question of petitioners' right to a hearing, see also *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L.Ed. 494; *In Re Carter*, 85 U.S. App. D.C. 229, 177 F.2d 75, cert. den. sub nom, *Laws v. Carter*, 338 U.S. 900, 70 S.Ct. 250, 94 L. Ed. 554 (1949); *In Re Carter*, 89 U.S. App. D.C. 310, 192 F. 2d 15, cert. den.; 342 U.S. 862, 72 S. Ct. 89, 96 L. Ed. 648 (1951); *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129.

²⁵ [J.A. 18, 19].

Thus, the Board dismissed the applications in its "sound administrative discretion." In this case "sound administrative discretion" becomes a substitute for the statutory procedural rights guaranteed to petitioners, since by exercising such discretion the Board has denied to petitioners a hearing, a hearing examiner, an initial decision by the examiner or a tentative decision by the Board, findings, a decision based upon findings supported by substantial evidence in the record, and effective judicial review. If the Court permits the Board's order to stand, it will have given approval for the exercise by an administrative agency of almost unlimited discretion to ignore the clear and express procedural requirements of the Federal Aviation Act and the Administrative Procedure Act.

Although the Board seems to view the applications as having been filed pursuant to Public Law 86-661, the Board states that it would exercise the same discretion even had the applications been filed pursuant to Section 401 of the Act.²⁶

Petitioners' applications were filed pursuant to Section 401 of the Act, as the applications clearly state on their face. But the Board ignores that fact and asserts that

"the statute [i.e., Public Law 86-661], both on its face and by its legislative history, shows that the Board was not expected to follow the procedural provisions of Section 401 in all its actions thereunder."

How the Board was able to arrive at that conclusion is difficult to understand. The effect of Public Law 86-661 will be discussed later in this brief.

The sole reason advanced by the Board for the arbitrary dismissal of the subject applications is that petitioners were found unqualified in the *Large Irregular* case.

²⁶ [J.A. 21].

In attempting to justify its order of dismissal the Board states:²⁷

"While they (i.e. petitioners) now say that there have been 'substantial changes' in their financial condition, operations, and employees, and that they will 'introduce evidence . . . to show that (each) has the disposition to comply with all of the regulatory requirements and that (each) is fit, willing, and able to perform the transportation for which it seeks authority,' this is substantially the same application which was made in their motion to reopen the *Large Irregular* case and which was found insufficient. Such allegations no more justify instituting a new proceeding than they did in reopening an existing proceeding."

Petitioners made more than one motion to reopen the record in the *Large Irregular* case to introduce evidence on the question of their qualifications after they learned for the first time from the examiner's initial decision that the question of violations was being tried and determined in that proceeding. Judge Fahy, in his dissenting opinion in *Great Lakes Airlines, Inc., et al. v. Civil Aeronautics Board*,²⁸ stated that petitioners were denied due process as a result of the Board's failure to reopen the hearing when requested by petitioners after the specific violations found were first made known to petitioners by the examiners' decision.

The Board's decision in the *Large Irregular* case, in which petitioners were found unqualified, was issued in January, 1959.²⁹ The evidence upon which the examiners found petitioners unqualified in that case was six to eight years old at the time the Board made its decision. That

²⁷ [J.A. 20].

²⁸ [Case No. 15,015, et al.] U.S. App. D.C., ... F.2d (1961).

²⁹ Board Order No. E-13436, adopted January 28, 1959.

evidence is now eight to ten years old. The hearings in the *Great Lakes* and *Currey* cases were held in 1953. The hearing in the *Trans-Alaskan* case was held in the early part of 1956. Although the Board has refused to receive *any* evidence in this proceeding, it is able to assert with finality, in its "sound administrative discretion," that petitioners are not now qualified for the services they propose to perform in the future as set forth in their applications filed in this proceeding. It would seem that the best evidence of petitioners' present qualifications to perform future services is evidence going to their present qualifications, not evidence eight to ten years old introduced in another proceeding. In one case before this Court involving a decision under Section 401 of the Act,³⁰ the Court, speaking through Judge Bazelon, stated:

"In determining under Section 401 whether an 'applicant is fit, willing, and able' and that the service sought 'is required by the public convenience and necessity,' the Board must weigh all the criteria found in the Act which give substance and vitality to the congressional mandate of policy set forth in Section 2 of the Act, 49 U.S.C.A. Sec. 402."

And in another case before this Court,³¹ Judge Prettyman, speaking for the Court, said with respect to permissive certificates of public convenience and necessity [192 F. 2d 420]:

"In the second place, the regulatory function, certainly insofar as it includes permissive certificates, is a forward-looking function, as any examination of regulatory measures easily demonstrates

³⁰ *Continental Southern Lines v. Civil Aeronautics Board*, 90 U.S. App. D.C. 352, 197 F. 2d 397, cert. den. 344 U.S. 831, 73 S. Ct. 37, 97 L. Ed. 647.

³¹ *American Airlines v. Civil Aeronautics Board*, 89 U.S. App. D.C. 365, 192 F. 2d 417.

"The public convenience and necessity for which regulatory agencies issue certificates are the convenience and necessity of the future."

And this Court held, in its second decision in the *Large Irregular* case,³² that the fitness of an applicant for a certificate must be fitness for the service authorized by the certificate. Accordingly, a finding by the Board of lack of qualification in one proceeding, based on an ancient record, does not preclude a finding of present fitness in another proceeding for service to be performed in the future. In *Minkoff v. Payne*, 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953), this Court, in affirming a denial of the Alcoholic Beverage Control Board to renew a license, speaking through Judge Fahy, said:

"In affirming the judgment we do so without prejudice to consideration by the Board of any application for a new license which the appellant might file or have pending. The findings which led to the Board action relate to conduct which terminated more than four years ago. The moral character and fitness of the appellant are not necessarily predetermined forever by what then was found to have occurred. Though we affirm and will cause to be dissolved, when our mandate issues, all existing stays or injunctions against the Board, we do not preclude the current exercise of its judgment with respect to appellant should it have occasion to do so."³³

The Board's refusal to receive *any* evidence in this proceeding is arbitrary and unreasonable. The applications should have been set down for hearing in accordance with the Administrative Procedure Act, and petitioners should have been given the opportunity to present all relevant

³² *United Air Lines, Inc. v. Civil Aeronautics Board*, *supra*.

³³ See also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L. Ed. 2d 796.

and material evidence concerning their qualifications and the public convenience and necessity for the proposed service. If the Board desired to rebut petitioners' evidence on their qualifications by introducing evidence from another proceeding, it could do so, subject to appropriate objections. But the Board could not lawfully prevent petitioners from introducing any evidence on the issues raised by their applications for certificates.

In the order under review the Board states:

"The action taken in this aspect of the case does not constitute any permanent barrier to the filing of applications by these carriers, but rather is a holding that, in all of the circumstances presented, the Board need not entertain their applications pursuant to Section 401."³⁴

In substance the Board is asserting that it has the discretion to determine when the provisions of Section 401 of the Act and the Administrative Procedure Act are applicable to applications for certificates. The authorities cited hold otherwise.

C. The Board Lacks Administrative Discretion Under Public Law 86-661 to Dismiss the Applications Without a Hearing.

Petitioners' applications were filed pursuant to Section 401 of the Act, as the applications state on their face. The Board in the order under review attempts to argue that petitioners rest their right to relief primarily on the provisions of Public Law 86-661.

The meaning and purpose of Public Law 86-661 is clear. As the Board has said,³⁵ the statute is an interim, stop-gap measure, designed to solve the immediate problems created by the *United Air Lines* decision of this Court on the

³⁴ [J.A. 21, footnote 6].

³⁵ [J.A. 16].

Board's 1959 decision in the *Large Irregular* case. It authorizes the Board to validate for not more than twenty months the certificates which this Court held invalid in *United*. It does not, contrary to what the Board asserts, give the Board discretion to ignore the procedural requirements of the Federal Aviation Act, the Administrative Procedure Act, or the Board's own procedural regulations. Section 12 of the Administrative Procedure Act³⁶ makes that point clear:

"Sec. 12 . . . No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly"

Public Law 86-661 does not, of course, expressly or by implication supersede or modify any provisions of the Administrative Procedure Act. Accordingly, Public Law 86-661 does not empower the Board to deny petitioners their procedural rights under Section 401 of the Act and the Administrative Procedure Act.

Petitioners' applications were filed pursuant to Section 401 of the Act, but petitioners are not thereby made ineligible for authority granted by the Board pursuant to Public Law 86-661. Although Public Law 86-661 does not, and cannot by the express terms of Section 12 of the Administrative Procedure Act, deprive petitioners of any procedural rights, it does permit the Board (for a period of twenty months) to issue certificates which would otherwise be invalid under Section 401 of the Act as construed by this Court in the *United* case.

Petitioners are eligible for authority under Public Law 86-661. The Board's arguments concerning the legislative history of that statute are not impressive. The statute as enacted by Congress is unambiguous and specific, and petitioners fall within the class of eligible carriers as defined

³⁶ 5 U.S.C. Sec. 1011, 60 Stat. 244.

therein. If Congress had intended to exclude petitioners and other carriers similarly situated, it could have done so easily and explicitly. The Board admits that petitioners are eligible within the literal terms of Public Law 86-661,³⁷ but suggests that the statute really doesn't mean what it so clearly says.

II

THE BOARD ERRED IN DISMISSING PETITIONERS' APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY WITHOUT MAKING FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE IN AN EVIDENTIARY RECORD CONSIDERED AS A WHOLE IN THIS PROCEEDING

Under Section 1005(f) of the Act³⁸ every order of the Board is required to set forth the findings of fact upon which it is made. And Section 7(c) of the Administrative Procedure Act³⁹ provides in part as follows:

"... no ... order (shall) be ... issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Section 8(b) of the Administrative Procedure Act⁴⁰ provides in part as follows:

"... All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all

³⁷ [J.A. 18].

³⁸ 49 U.S.C. Sec. 1485(f); 72 Stat. 794.

³⁹ 5 U.S.C. Sec. 1006(c); 60 Stat. 241.

⁴⁰ 5 U.S.C. Sec. 1007(b); 60 Stat. 242.

the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Section 10(e) of the Administrative Procedure Act⁴¹ provides as follows:

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determination the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

In the instant case the Board not only failed to make findings, it failed to make any evidentiary record whatever. Under these circumstances the Board's decision is not based upon substantial evidence and the Board by its arbitrary action has effectively prevented judicial review

⁴¹ 5 U.S.C. Sec. 1009(e); 60 Stat. 243.

of its order. Under the authority of *Universal Camera* and other cases⁴² the Board's order cannot stand. It is clear from the Supreme Court's decision in *Universal Camera* that the record subject to review by the reviewing court must not only include such contradictory evidence or evidence from which conflicting inferences could be drawn as the parties may have introduced, but the record must also include an examiner's report. In discussing these matters, the Supreme Court stated in *Universal Camera* [340 U.S. 487, 488, 493, 494]:

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

". . . And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legisla-

⁴² *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456; *Jordan v. American Eagle Fire Ins. Co.*, 83 U.S. App. D.C. 192, 169 F. 2d 281; *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626; *In Re United Corporation*, 249 F. 2d 168 (CA 3); *Greensboro-High Point Airport Authority v. Civil Aeronautics Board*, 97 U.S. App. D.C. 358, 231 F. 2d 517; *Boudin v. Dulles*, 98 U.S. App. D.C. 305, 235 F. 2d 532.

tion definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.

"It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."

In the instant case there was no examiner appointed by the Board. Moreover, the Board not only refused to receive any contradictory evidence or evidence from which conflicting inferences could be drawn, it refused to receive any evidence.

In discussing the question of the findings required to be made by an administrative agency, the Court in *In Re United Corporation*, *supra*, stated [249 F. 2d 180, 181]:

"Here, with respect to Phillips' allowance, the Commission failed to make the explicit findings required of it by both judicial decision and the Administrative Procedure Act . . .

"That this violates the unequivocal mandate of the law is clear. As to every material issue presented, an administrative agency must make findings of fact. Further, where the agency fails to adopt the findings of the hearing examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report (citations omitted). The Order of the Commission here fails to meet these standards. A bare conclusion is insufficient even when

prefaced by a statement that it was reached after careful consideration of all the evidence, as here (citations omitted). Strikingly applicable here is the much-quoted statement of Justice Cardozo that '(W)e must know what a decision means before the duty becomes ours to say whether it is right or wrong.' (Citations omitted)."

There being no evidentiary record to review, and no findings, there is no basis upon which the Court may affirm the Board's order. Whatever discretion the Board may have to pick and choose among the procedural steps it will follow in an adjudicatory proceeding, and the applicable statutes and cases indicate that such discretion is slight if not nonexistent, it does not include the power to eliminate an evidentiary record or clear findings based upon substantial evidence in that record to support the Board's order.

CONCLUSION

This case presents a classic example of the type of arbitrary administrative action that the Administrative Procedure Act was designed to prevent. The Board's action in this proceeding is inconsistent with the principles followed by the courts in the cases cited. If the Board's order under review is permitted to stand, this case will have far-reaching consequences. The way will then be cleared for an administrative agency to deny an applicant for authority all or most of the procedural rights guaranteed by the Administrative Procedure Act under the guise of "sound administrative discretion," and to prevent effective judicial review of its action by eliminating any evidentiary record or findings which can be reviewed.

Judge Edgerton, speaking for the majority in the second *Carter* case, *supra*, said with respect to the denial by the United States District Court, without a hearing, of an application to engage in the bonding business:

"The District Court did not disclose what qualification it believed appellant lacked. Against the back-

ground of the sealed envelope its present action seemed, as its former action seemed, to imply a belief that appellant's character is not good. It did not disclose the source of its belief. It said appellant's application was 'in the administrative discretion of the court.' From that premise it seems to have drawn the conclusion that it could deny the application without a hearing, without evidence, and without possibility of review to determine whether its discretion was abused. On this appeal the Solicitor General as *amicus curiae* takes substantially the same position. Though some of the language in our opinion on the former appeal may seem to support this position, we think it erroneous."

The evils inherent in the lower court's action in *Carter* are present in the instant case. The Board's order should be reversed, and the case remanded to the Board.

Respectfully submitted,

CHARLES H. OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

DAYTON M. HARRINGTON
454 Washington Building
Washington 5, D. C.

Attorneys for Petitioners

KEATINGE AND OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

Of Counsel

March 14, 1961.

APPENDIX

Statutory Provisions Involved

Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. Sec. 1301 et seq:

Sec. 401(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Sec. 401(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Sec. 401(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Sec. 401(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public

convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Sec. 1005(f) Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Sec. 1006(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Sec. 1006(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Sec. 1006(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sec. 1001 et seq:

Sec. 2(d) *Order and Adjudication*. "Order" means the whole or any part of the final disposition (whether affirma-

tive, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Sec. 2(e) *License and Licensing*. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5. *Adjudication*. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

Sec. 5(a) *Notice*. Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Sec. 5(b) *Procedure*. The agency shall afford all interested parties opportunity for (1) the submission and con-

sideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

Sec. 5(c) *Separation of Functions.* The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Sec. 7 *Hearings.* In hearings which section 4 or 5 requires to be conducted pursuant to this section—

Sec. 7(a) *Presiding Officers.* There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or be-

fore boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

Sec. 7(b) *Hearing Powers.* Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon officers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

Sec. 7(c) *Evidence.* Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or

determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Sec. 7(d) *Record*. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8 *Decisions*. In cases in which a hearing is required to be conducted in conformity with section 7—

Sec. 8(a) *Action by Subordinates*. In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a

tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

Sec. 8(b) *Submittals and Decisions.* Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 9 *Sanctions and Powers.* In the exercise of any power or authority—

Sec. 9(a) *In General.* No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

Sec. 9(b) *Licenses.* In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no with-

drawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Sec. 10 *Judicial Review.* Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

Sec. 10(a) *Right of Review.* Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Sec. 10(e) *Scope of Review.* So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided

by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Sec. 12 *Construction and Effect.* Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Public Law 86-661, 74 Stat 527, July 14, 1960.

AN ACT To provide that the Civil Aeronautics Board may temporarily authorize certain air carriers to engage in supplemental air transportation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

[Sec. 1] That the Civil Aeronautics Board (hereafter in this Act referred to as the "Board") is empowered—

(1) to validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

Sec. 2(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

Board's Rules Of Practice In Economic Proceedings, Part 302 of the Board's Procedural Regulations, 14 CFR 302.1, et seq:

Sec. 302.1(a) *Application.* This part governs the conduct of all economic proceedings before the Board whether instituted by order of the Board or by the filing with the Board of an application, complaint or petition.

Sec. 302.26 *Proposed findings and conclusions before the Examiner or the Board.* Within such limited time after the close of the reception of evidence fixed by the Examiner, any party may, upon request and under such conditions as the Examiner may prescribe, file for his consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the Board without the preparation of an initial or recommended decision by the Examiner.

Sec. 302.27(a) *Action by Examiner after hearing.* Except where the Board directs otherwise, after the taking of evidence and the receipt of proposed findings and conclusions, if any, the Examiner shall take the following action:

(1) *Rates, fares, charges, etc., mail compensation.* In cases relating to rates, fares, or charges, classification, rules or regulations or practices affecting such matters or value of service, or mail compensation, the Examiner shall render an initial decision orally on the record or in writing if, before the close of the hearing, any party so requests, or, if no such request is made, he shall certify the record to the Board for decision.

(2) *Cases subject to section 801 of the act.* In cases where the action of the Board is subject to the approval of the President pursuant to section 801 of the Act, the Examiner shall render a recommended decision orally on the record or in writing.

(3) *Other matters.* If the proceeding relates to any matter not provided for in subparagraphs (1) or (2) of this paragraph, the Examiner shall render an initial decision orally on the record or in writing.

Sec. 302.28 *Effect of initial decision of Examiner.* Ordinarily, the final decision in any proceeding covered by this part will be made by the Board. However, in non-

controversial and routine proceedings, an initial decision of an Examiner may under certain circumstances become the final and constitute the Board's ultimate disposition of the case. Therefore, unless timely exceptions to an initial decision of an Examiner are filed by one of the parties (including Bureau Counsel or an Enforcement Attorney) such decision shall, unless the Board upon its own motion determines to review the decision, become final and constitute the Board's ultimate disposition of the case. The initial decision, however, shall become effective only upon the issuance of a Board order following expiration of the time fixed therein by the Examiner for the filing of exceptions, but in no case less than fifteen (15) days from its issuance.

Sec. 302.29 Tentative decision of the Board.

(a) Except as provided in paragraph (b) of this section, whenever the Examiner certifies the record in a proceeding directly to the Board without issuing an initial or recommended decision in the matter, the Board shall, after consideration of any proposed findings and conclusions submitted by the parties, prepare a tentative decision and serve it upon the parties. Every tentative decision of the Board shall state the names of the persons who are to receive copies of it, the time within which exceptions to such decision may be filed, the time within which briefs in support of the exceptions may be filed, and the date when such decision will become final in the absence of exceptions thereto. If no exceptions are filed to the tentative decision of the Board within the period fixed (which in no event shall be less than 10 days), it shall become final at the expiration of such period unless the Board orders otherwise.

(b) Notwithstanding the provisions of paragraph (a) of this section, in rule making proceedings or proceedings determining applications for initial licenses, the Board may omit a tentative decision in any case in which it finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

Sec. 302.30 *Exceptions to initial or recommended decisions of Examiners or tentative decisions of the Board.* Within ten (10) days after service of any initial or recommended decision of an Examiner or tentative decision of the Board, or such longer period as may be fixed therein, any party to a proceeding (including Bureau Counsel or an Enforcement Attorney) may file exceptions to such decision with the Board. Each separately numbered exception shall identify the part of the initial, recommended or tentative decision excepted to, shall designate, by exact and specific reference, the portions of the record relied upon in support of such exception, and shall state the grounds for such exception, including the citation of the statutory provisions or principal authorities in support thereof. Any objection to a ruling, finding or conclusion which is not excepted to shall be deemed to have been waived, and the Board need not consider such objections if raised at a later time.

Sec. 302.33 *Waiver of procedural steps after hearing.* The parties to any proceeding may agree to waive any one or more of the following procedural steps provided in §§ 302.25 through 302.32: Oral argument before the Examiner, the filing of proposed findings and conclusions for the Examiner or for the Board, a recommended decision of the Examiner, a tentative decision of the Board, exceptions to an initial or recommended decision of the Examiner or to a tentative decision of the Board, the filing of briefs with the Board, or oral argument before the Board.

Sec. 302.36 *Final decision of the Board.* Upon submittal of a case to the Board for final decision on the merits the Board will consider the whole record, including the initial or recommended decision of the Examiner or its tentative decision, and the exceptions thereto, will resolve all questions of fact by what it deems to be the greater weight of the evidence thereon, will make its decision, stating the reasons or basis therefor, and enter an appropriate order.

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

APR 7 1951

No. 16,165

Joseph W. Stewart
CLERK

GREAT LAKES AIRLINES, INC., CUREY AIR TRANSPORT,
LIMITED, TRANS-ALASKAN AIRLINES, INC., Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
CIVIL AERONAUTICS BOARD

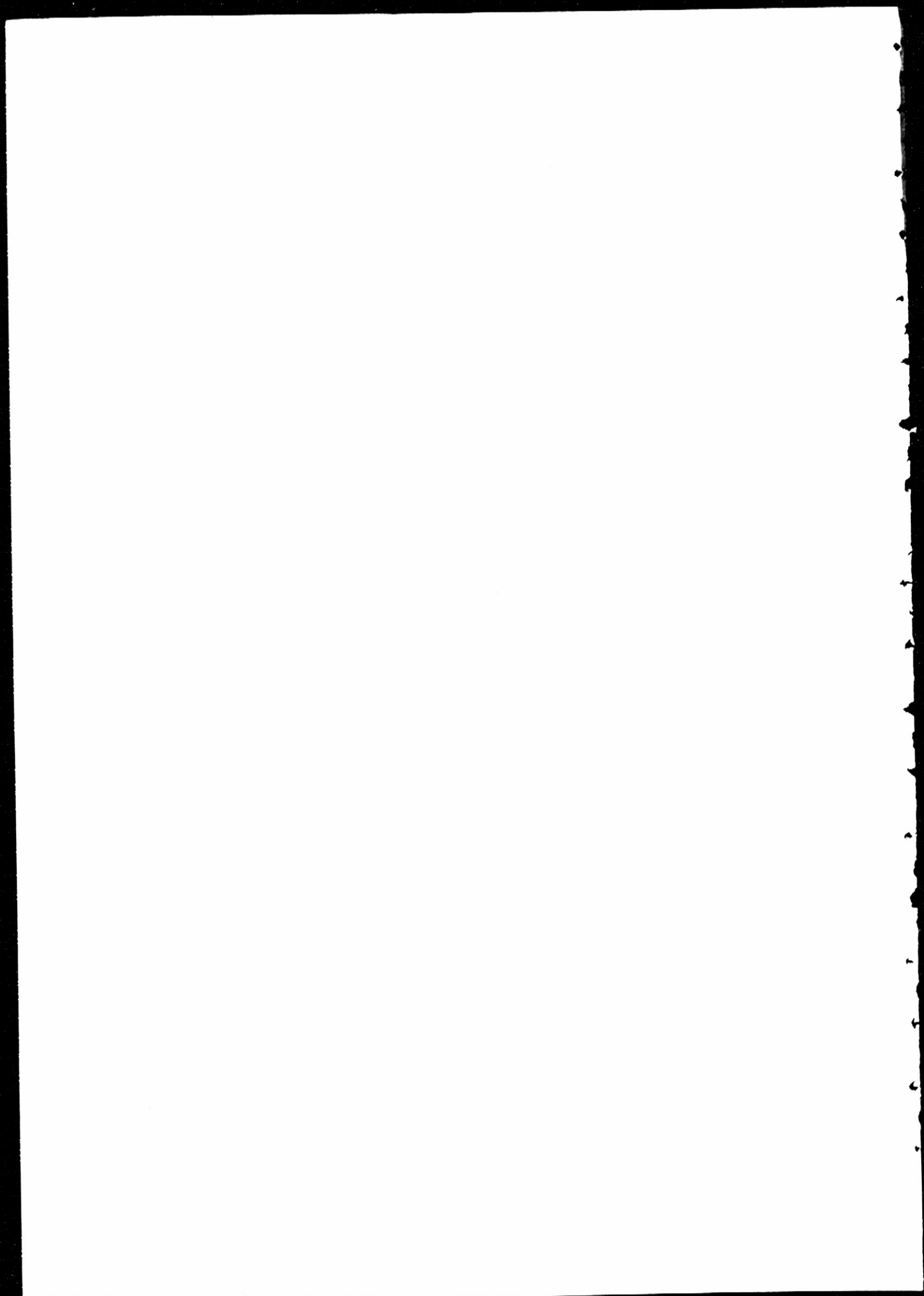
LEE LOEVINGER,
Assistant Attorney General,

RICHARD A. SOLOMON,
Attorney,
Department of Justice,

O. D. OZMENT,
Associate General Counsel,
Litigation and Research,

ROBERT L. TOOMEY,
Attorney,
Civil Aeronautics Board.

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.



(1)

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Board, after full hearing, awarded certificates of public convenience and necessity to various carriers, authorizing them to engage in supplemental air transportation. In the same proceeding it denied petitioners' applications for such certificates, finding that they were unqualified. This Court set aside the awards to the successful applicants upon the ground that the Board lacked statutory authority to certificate such operations. Congress promptly enacted P.L. 86-661 which was a stop-gap measure authorizing the Board to validate for 20 months the certificates set aside by this Court and also to award interim operating authority of similar duration to certain other carriers. Petitioners immediately filed applications under P.L. 86-661 which the Board dismissed without hearings on the merits. In the opinion of the Board, the following questions are presented:

1. Whether P.L. 86-661 was intended by Congress to authorize the Board to award interim operating authority to carriers such as petitioners whose prior applications have been validly denied.

2. Whether, if it had statutory authority to grant petitioners' applications, the Board was required either by P.L. 86-661 or Section 401(c) of the Federal Aviation Act, or a combination of the two, to hold full-scale evidentiary hearings on petitioners' second applications, and, if not,

(ii)

3. Whether under the circumstances here presented the Board abused its discretion in dismissing petitioners' applications without a hearing on the merits.

(iii)

INDEX

	Page
Counterstatement of Questions Presented	(i)
Counterstatement of the Case	1
Statutes Involved	8
Summary of Argument	9
Argument	11
I. The Board was not required to hold evidentiary hearings on the merits of petitioners' applica- tions prior to dismissing them	11
A. P.L. 86-661 was not intended by Congress to authorize the grant of applications such as those filed by petitioners	13
B. In any event, the Board had discretionary power to dismiss petitioners' applications . .	18
II. If it be assumed that the Board could have granted petitioners' applications, its dismissal nonethe- less did not constitute an abuse of discretion . .	25
Conclusion	30
Appendix	31

CITATIONS

Cases:

<u>A.F. of L. v. Labor Board</u> , 308 U.S. 401, 404 (1940) . .	12
<u>American Airlines v. Civil Aeronautics Board</u> , 97 U.S. App. D.C. 324, 231 F. 2d 483 (1956).	24
<u>American Airlines v. Civil Aeronautics Board</u> , 98 U.S. App. D.C. 348, 235 F. 2d 845 (1956), <u>cert. denied</u> , 353 U.S. 905	1, 2, 3, 13
<u>City of Dallas v. Rentzel</u> , 172 F. 2d 122 (C.A. 5, 1949), <u>cert. denied</u> 338 U.S. 858	12
<u>Denver Union Stock Yard Co. v. Livestock Assn.</u> , 356 U.S. 282 (1958)	13
<u>Dorsey v. Gill</u> , 80 U.S. App. D.C. 9, 148 F. 2d 857, 869 (1945), <u>cert. denied</u> , 325 U.S. 890	22

Index continued	Page
* <u>Dyestuffs & Chemicals, Inc. v. Flemming</u> , 271 F. 2d 281 (C.A. 8, 1959), <u>cert. denied</u> , 362 U.S. 911	13
* <u>Eastern Air Lines v. Civil Aeronautics Board</u> , 87 U.S. App. D.C. 331, 185 F. 2d 426 (1950), vacated as moot, 341 U.S. 901	24
* <u>Eastern Air Lines v. Civil Aeronautics Board</u> , C.A.D.C. No. 10671, decided March 15, 1951 (unreported), <u>cert. denied</u> 341 U.S. 951	24
* <u>Great Lakes Airlines v. Civil Aeronautics Board</u> , U.S. App. D.C. _____, F. 2d _____ (No. 15,015, decided February 24, 1961)	2, 4, 6, 17, 28
<u>Interstate Commerce Commission v. Jersey City</u> , 322 U.S. 503 (1944)	23
* <u>Large Irregular Air Carrier Investigation, Docket 5132</u>	1, 3, 7, 8, 15, 16, 25, 26, 28, 29
<u>Mastro Plastics Corp. v. Labor Board</u> , 350 U.S. 270 (1956)	18
<u>Pan American World Airways v. Civil Aeronautics Board</u> , 104 U.S. App. D.C. 288, 261 F. 2d 754 (1958), <u>cert. denied</u> 359 U.S. 912	24
<u>Payne v. Minkoff</u> , 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953)	29
* <u>Salinger v. Loisel</u> , 265 U.S. 224 (1924)	22
<u>Springfield Airport Authority v. Civil Aeronautics Board</u> , _____ U.S. App. D.C. _____, 285 F. 2d 277 (1960)	24
<u>United Air Lines v. Civil Aeronautics Board</u> , C.A.D.C. No. 15,348	5
* <u>United Air Lines v. Civil Aeronautics Board</u> , _____ U.S. App. D.C. _____, 278 F. 2d 446 (1960), judgment vacated <u>sub nom. All American Airways v. United Air Lines</u> , 364 U.S. 297	2, 4, 9, 11, 14
* <u>United States v. American Trucking Ass'ns</u> , 310 U.S. 534 (1940)	18
* <u>United States v. Storer Broadcasting Co.</u> , 351 U.S. 192 (1956)	9, 13, 23
<u>United States v. Thompson</u> , 144 F. 2d 604 (C.A. 2, 1944), <u>cert. denied</u> , 323 U.S. 970	22
*Cases chiefly relied upon are marked by asterisks	

(v)

Index continued

Page

Statutes:

Act of July 14, 1960, 74 Stat. 572 (P.L. 86-661) . . (i), 2,
4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
14, 17, 18, 19, 20, 21, 23, 32

Administrative Procedure Act (60 Stat. 237, 5 U.S.C.

1001 et seq.):

Sec. 5 20
Sec. 7 20, 23
Sec. 8 20, 23
Sec. 10(e) 23
Sec. 12 20

Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C.

1301 et seq.):

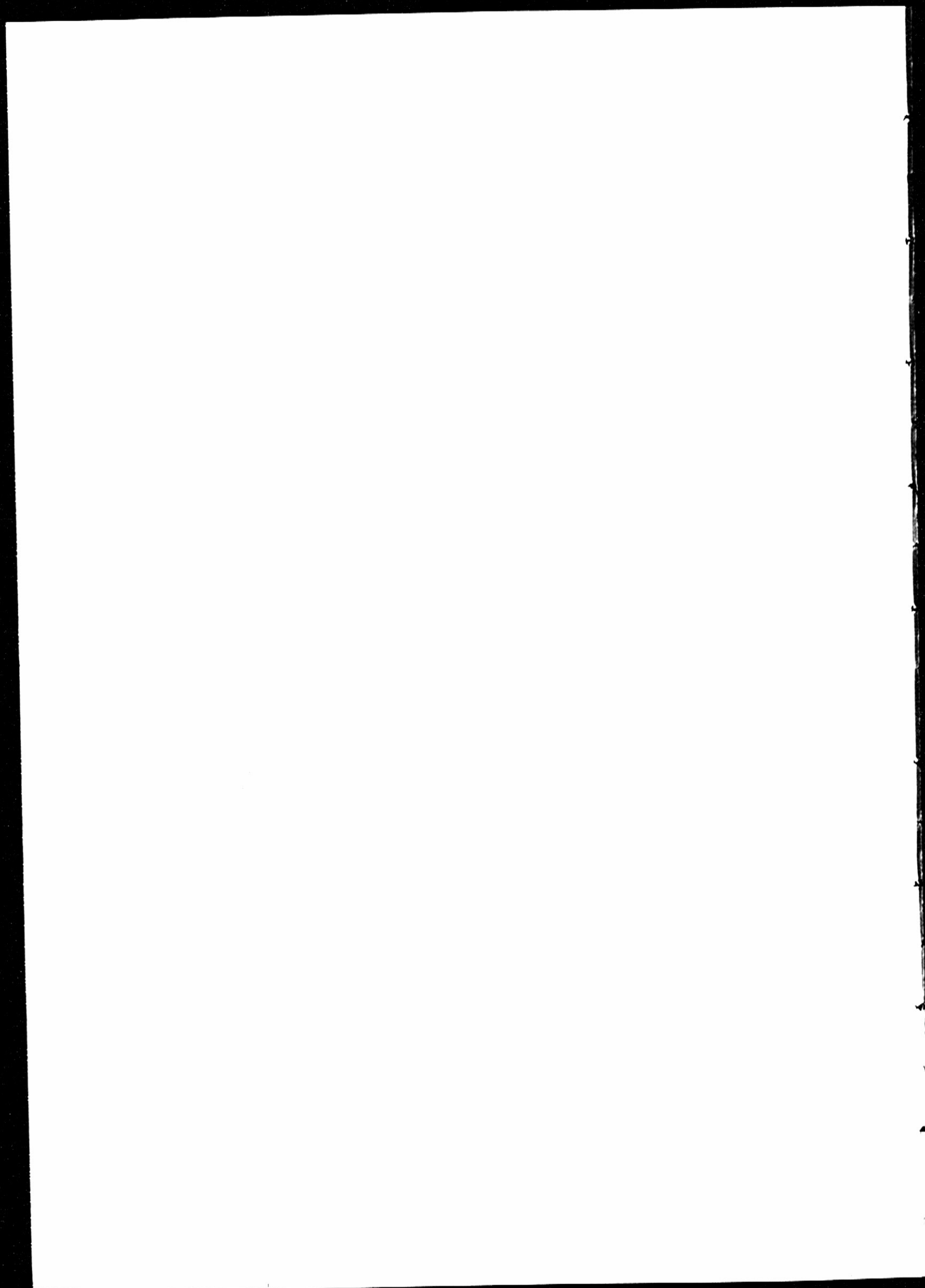
Sec. 401(c) (i), 8, 10, 11, 20, 21, 22, 31
Sec. 401(e) 4, 31
Sec. 801 3
Sec. 1005(f) 23, 32
Sec. 1006(a) 12, 32

Congressional Materials:

Cong. Rec., June 24, 1960, p. 13221 15
Cong. Rec., June 27, 1960, pp. 13430-13431 16, 19
Hearings before a Subcommittee of the House Com-
mittee on Interstate and Foreign Commerce on
H.R. 7593, 86th Cong., 2d Sess. 14
H. Rept. No. 1877, 86th Cong., 2d Sess. 4, 14, 15
H. Rept. No. 2072, 86th Cong., 2d Sess. 17
S. Rept. No. 1567, 86th Cong., 2d Sess. 4

Regulations:

47 C.F.R. 1.309 22



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT,
LIMITED, TRANS-ALASKAN AIRLINES, INC., Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Petitioners are three air carriers conducting so-called "supplemental" operations under interim exemption authority and whose applications for certificates of public convenience and necessity for domestic supplemental air service were denied by the Board in its Large Irregular Air Carrier Investigation, Docket 5132, et al.^{1/} This Court set aside the certificates which had been issued to the successful applicants in the Board's proceeding

^{1/} The "Supplemental Air Carriers" are authorized to conduct in domestic service (1) ten flights per month on a scheduled basis between any two points in the United States for the transportation of individually-ticketed or waybilled traffic, and (2) unlimited charter flights between such points. See American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (1956), cert. denied, 353 U.S. 905.

on grounds that the Board lacked statutory authority to authorize such operations by certificates. United Air Lines v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, 278 F. 2d 446 (1960), judgment vacated sub nom. All American Airways v. United Air Lines, 364 U.S. 297. The Congress then adopted interim legislation (P.L. 86-661, infra, p. 32) which authorized the Board (1) to validate the certificates previously issued for a limited period, and (2) within such period to issue new authorizations for like service to certain persons. Petitioners in effect refiled their applications for domestic certificates, claiming to be entitled to the benefits of the new legislation. The Board (Order E-16050) disagreed, and dismissed their applications on motion of Bureau Counsel (J.A. 4) and answer thereto (J.A. 7). Petitioners contend that the dismissal was improper, and that the Board could validly dispose of the applications only after full evidentiary hearings and on findings as to the merits of their proposals and qualifications.

Petitioners are members of the class known as "Large Irregular" or "Supplemental Air Carriers" whose operations were begun in the 1940's under blanket exemption authority. Since problems involving this classification of carriers have many times been considered by this Court,^{2/} we sketch only the salient facts. For present purposes,

^{2/} E.g., Great Lakes Airlines v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 15,015, decided February 24, 1961); United Air Lines v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, 278 F. 2d 446 (1960), judgment vacated per curiam and case remanded with instructions sub nom. All American Airways v. United Air Lines, 364 U.S. 297; American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (1956), cert. denied, 353 U.S. 905.

it is sufficient to state that all carriers of the class were permitted to continue operations pending a determination by the Board of (1) the appropriate place of the irregular carriers in the air transportation system and the scope of their operations, (2) the carriers to receive continued authority, and (3) the form of such authority, i.e., by certificate or exemption. In 1955, the Board by its Order E-9744 determined that the scope of operating authority should be as previously stated (10 flights per month for individual service and unlimited charter authority). All the carriers of the class were granted the new authority by Order E-9744 pending decision on the remaining issues. See American Airlines v. Civil Aeronautics Board, supra.

By its Order E-13436, entered on January 28, 1959, the Board took the following actions with respect to the domestic portion of the proceeding:^{3/} (1) it issued certificates of public convenience and necessity to twenty-three carriers; (2) it ordered further proceedings on the applications of five other carriers; and (3) it denied the applications of twenty-two more, which included those

^{3/} The "international phases," i.e., "foreign," "overseas," and "intraterritorial" transportation were not then dealt with since action on the certificate applications in these areas required the President's approval. See Section 801, 49 U.S.C. 1461. The President has since taken action, approving the Board's denial of the applications of applicants found unqualified but disapproving on economic grounds award to applicants found qualified. Inasmuch as the instant case involves domestic service only, no further mention will be made of the international phases of the Large Irregular case.

of these petitioners. The petitioners' applications were denied on grounds of lack of qualification based on prior violations of the Act indicating a lack of compliance disposition.

Judicial review was then sought in this Court of both the grants and the denials. The certificated trunkline carriers challenged the award of certificates to the applicants found qualified and a number of the carriers found unqualified--including the petitioners--assailed the denial of their applications and the consequent termination of their prior operating authority. The trunklines' case was heard first and on April 7, 1960 the Court set aside the award of certificates to the applicants found qualified. United Air Lines v. Civil Aeronautics Board, supra, 278 F. 2d 446. It held that Section 401(e) of the Act (49 U.S.C. 1371) precluded the issuance of certificates which do not contain named terminal and intermediate points, and also precluded the 10-flight limitation. Decision on the "denial" phases of the case was entered on February 24, 1961, and the Court affirmed the denial of the applications of these petitioners. Great Lakes Airlines v. Civil Aeronautics Board, supra.

Shortly after the Court's decision in United holding that the Board lacked authority to issue certificates for supplemental service, the Congress enacted special legislation. P.L. 86-661 set forth, infra, p. 32.^{4/} That act empowered the Board to "validate

^{4/} Such legislation was not in terms an amendment to the Federal Aviation Act, but rather was stop-gap interim legislation to afford Congress more time within which to consider the over-all question. See S. Rept. No. 1567, H. Rept. No. 1877, 86th Cong., 2d Sess.

for a period not to exceed 20 months" those certificates for supplemental service theretofore issued by the Board,^{5/} and "to confer interim operating authority to engage in supplemental air transportation for a period not to exceed 20 months" upon any person or carrier which (A) had operated as a supplemental carrier under the Board's Order E-9744, or (B) had an application for a certificate as a supplemental carrier pending before the Board on the date of the statute. In this latter connection, it may be stated that the Board in issuing certificates to the carriers had stated in its Order E-13436 that it did not deem the class of carriers to be closed and that it would issue certificates to new applicants on certain specified showings. As a result of this pronouncement, there were pending before the Board several applications for supplemental authority by persons who had not theretofore engaged in air transportation, as well as the applications of those carriers on which further proceedings had been ordered.

Immediately after passage of P.L. 86-661 by Congress and before it was approved by the President, petitioners filed the applications which were dismissed by the order here under review. Following the language of the certificates set aside in United, they requested

^{5/} As the face of the statute discloses, the Board in addition to Order E-13436 also had issued certificates by its Order E-14196. These latter certificates were to two carriers who had not initially sought certificate authority as such, but who filed certificate applications in response to Order E-13436. See United Air Lines v. Civil Aeronautics Board, C.A.D.C. No. 15,348.

authority to engage in "scheduled supplemental air transportation between any point in any state in the United States or in the District of Columbia and any other point in any state in the United States or the District of Columbia" (J.A. 3). A motion to dismiss filed by the Board's Bureau of Air Operations and answers thereto by petitioners followed. In due course the Board issued Order E-16050 dismissing the applications (J.A. 14-21).

The Board viewed the applications as resting primarily upon the theory that P.L. 86-661 authorized the award of the authority requested. It carefully reviewed the legislative history of the statute and concluded that the Congress intended that the Board (in addition to the validation of the certificates previously issued) be authorized to issue interim authorizations only to the three following classes of persons: (1) those carriers of the original class whose certificate applications had not been disposed of but rather had been reopened for further proceedings in Docket 5132; (2) those persons who for the first time had filed applications for supplemental authority in response to the Board's invitation in Order E-13436; and (3) any unsuccessful applicant who might obtain a judicial reversal of the Board's denial of its application. In other words, the Board considered that the statute would apply to these petitioners only if this Court should determine that the Board had erroneously denied their applications.^{6/} The Board's view was

^{6/} This Court held the other way. Great Lakes Airlines v. Civil Aeronautics Board, supra.

that Congress had "not intended to afford a statutory basis for granting applications such as these" (J.A. 16), i.e., by those carriers as to which there were then outstanding Board orders of denial on the merits of their applications. Rather, the Board viewed these petitioners in the then posture of the case as in effect seeking reconsideration of the prior denial upon the ground of alleged changed circumstances and it found no basis for reading the statute "as having been fashioned as a vehicle for such a proceeding, or to require it to reconsider the numerous denials heretofore made in Docket 5132" (J.A. 18).

Even if P.L. 86-661 authorized it to entertain the applications, the Board continued, it saw nothing in the statute which required it to hold a full evidentiary hearing. Rather, it said, it believed that it had discretionary power to dismiss applications in appropriate circumstances and concluded that "an agency, having just completed consideration of a matter, need not immediately thereafter re-entertain a new application for the same authorization" (J.A. 19). In this connection, it pointed out that petitioners had been found disqualified in the Large Irregular case only after full opportunity to present evidence bearing on all aspects of their qualifications (J.A. 19). Their violations, it said, "were extremely serious and of considerable duration" (J.A. 20), and general allegations of changed circumstances, present

qualification, etc., were found insufficient to justify instituting a new proceeding.^{7/}

Finally, the Board considered the applications and the motion to dismiss under Section 401 of the Federal Aviation Act without reference to P.L. 86-661 and reached the same conclusion. It pointed out that this Court had held in United that Section 401 does not permit certification of supplemental service and that the Supreme Court had not reached the merits of the case, thus leaving the question open. It concluded that until the question is finally decided (either by Congress or the Supreme Court), "the Board should [not] undertake to issue certificates which the Court of Appeals has said are beyond the scope of the Act" (J.A. 21). In any event, the Board went on, Section 401(c) should not be read as requiring that all applications be processed regardless of the circumstances and it found that the considerations already discussed (supra, p. 7) justified dismissal under Section 401(c) standing alone.

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix to this brief, as is P.L. 86-661 (infra,

^{7/} The Board pointed out that similar generalities had been advanced by petitioners in support of a motion to reopen the Large Irregular record after issuance of the final decision therein and had been found insufficient, and noted that the petitioners had abandoned any contention in the review proceedings in this Court that refusal to reopen had been an abuse of discretion (J.A. 19-20).

p. 31). Other statutory provisions are quoted or cited at the appropriate places in the text.

SUMMARY OF ARGUMENT

I

Since this Court had held in United that Section 401 of the Federal Aviation Act does not permit the issuance of certificates for supplemental air transportation, the only basis for the possible grant of petitioners' applications was P.L. 86-661. The Board need not "waste time on applications that do not state a valid basis for a hearing" (United States v. Storer Broadcasting Co., 351 U.S. 192, 205) and hence, if P.L. 86-661 was not intended by Congress to authorize interim operating rights for carriers whose applications had been validly denied in Docket 5132, it was not required to hold hearings on the merits of the applications here involved.

P.L. 86-661 was a purely temporary measure designed to meet the immediate problems created by the United decision until such later time as Congress could consider proposals for permanent legislation amending the Federal Aviation Act. Its purpose was merely to maintain the status quo. Insofar as carriers were concerned whose applications had been denied in Docket 5132, the legislative history indicates that its purpose was simply to permit them to continue to operate during the pendency of their appeals to this Court and also to empower the Board to give them interim operating authority in the event they should secure a reversal of the prior denial. Petitioners did not meet this condition.

Even if there were a technical statutory basis for granting the applications, the Board had the discretionary power to dismiss. Not only did P.L. 86-661 not specifically require hearings, but its language and legislative history, as well as its special and short-term nature, all suggest that the appropriate manner of its administration was left to the Board. These considerations, reinforced by the fact that P.L. 86-661 was not an amendment of the Federal Aviation Act, refute the argument that the Board was obliged to follow the procedures of Section 401(c) of the latter Act. Further, Section 401(c) itself would not preclude discretionary dismissal. The Board obviously need not proceed immediately to rehear a matter just decided by it. The existence of inherent discretionary power not to entertain repetitious filings is based upon necessity and is well recognized. Lastly, and contrary to petitioners' contention, general statutory provisions regarding the necessity for findings supported by substantial evidence do not require a hearing not otherwise required. Likewise, the absence of an evidentiary record is no barrier to judicial review.

II

Again assuming statutory power to grant the applications, the Board's dismissal of the applications under the circumstances of this case was entirely reasonable. Petitioners had had a full and fair hearing on their applications in Docket 5132. The present applications came on the very heels of the Board's final denial of their applications in that case. In view of the shortness of the time

lapse, the nature of the Board's findings in that case, and the short-term nature of P.L. 86-661 the Board was entitled to insist that they make some sort of showing of changed circumstances which would justify rehearing. They made none.

ARGUMENT

I. The Board was not required to hold evidentiary hearings on the merits of petitioners' applications prior to dismissing them

Petitioners' principal contention appears to be that their certificate applications for "supplemental service" are to be viewed as any other certificate applications filed pursuant to Section 401 of the Federal Aviation Act, and that Section 401(c) (*infra*, p. 31) requires a "public hearing" on the merits prior to the disposition of a certificate application. But apart from what we believe to be a misconception by petitioners of the requirements of Section 401(c), these were not conventional applications filed under ordinary circumstances. On the contrary, they were filed for authorizations which this Court had held to be beyond the power of the Board to grant under Section 401,^{8/} and thus where the only practical basis for a grant would be the special short-term interim provisions of P.L. 86-661 (*infra*, p. 32).^{9/} Further, they were filed before judicial

^{8/} United Air Lines v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, 278 F. 2d 446 (1960), vacated and remanded with instructions 364 U.S. 297.

^{9/} The Supreme Court's action in vacating this Court's judgment in United afforded no basis for awarding new certificates pursuant to the Federal Aviation Act. As the Board pointed out (J.A. 21), the Court did not reach the merits but simply "recognized that P.L. 86-661 removed an immediate need for its consideration of the

review had been completed of the Board's denial of petitioners' prior applications for the same authority in the very proceeding which gave rise to P.L. 86-661.

Hence it is no answer to say, as would petitioners, that Section 401 is the applicable statutory provision, with P.L. 86-661 serving merely to "permit the Board (for a period of twenty months) to issue certificates which would otherwise be invalid under Section 401" (Br. p. 14). Rather, the principal issue is whether the interim legislation required the Board to entertain the applications on their merits and to hold evidentiary hearings thereon prior to their disposition. We hereinafter show that it did not, whether viewed separately or in conjunction with Section 401.^{10/} That being so, the Board was

question, and . . . provided a means whereby the question can be further litigated in the event that controversy revives through failure of Congress to take permanent action prior to the expiration of the interim legislation."

To be sure, it can be argued that the Board might have acted upon the basis of Section 401 on the ground that the Court's judgment had never become final, but it seems clear beyond argument that the Board was not required to hold hearings on applications for certificates "which the Court of Appeals has said are beyond the scope of the Act" (J.A. 21).

^{10/} Petitioners' reliance on Section 401 and virtual ignoring of P.L. 86-661 perhaps may rest on (a) a desire to avoid what we believe to be the clear Congressional intent in relation to the interim legislation, and (b) to avoid the possible question of whether the order is reviewable here under the Section 1006(a) (*infra*, p. 32) provision conferring jurisdiction to review any Board order issued "under this Act," *i.e.*, the Federal Aviation Act. P.L. 86-661 is not an amendment to the Federal Aviation Act (see the Board's finding, J.A. 18) and, to the extent that the Board's order rests thereon, review in terms is not authorized. See, *e.g.*, *A.F. of L. v. Labor Board*, 308 U.S. 401, 404 (1940); *City of Dallas v. Rentzel*, 172 F. 2d 122 (C.A. 5, 1949), *cert. denied* 338 U.S. 858. However, we perceive no real jurisdictional problem in that the Board rested the order in part on a determination that, if applicable, Section 401 did not preclude a

not required to "waste time on applications that do not state a valid basis for a hearing." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956); Denver Union Stock Yard Co. v. Livestock Assn., 356 U.S. 282, 287 (1958); Dyestuffs & Chemicals, Inc. v. Flemming, 271 F. 2d 281, 284, 286-287 (C.A. 8, 1959), cert. denied 362 U.S. 911.

- A. P.L. 86-661 was not intended by Congress to authorize the grant of applications such as those filed by petitioners

In construing P.L. 86-661 it is important to keep in mind the background against which it was enacted. This Court's decision in United that the Board could not certificate supplemental service created an immediate crisis in the supplemental industry. The Court had already cast grave doubt upon the possibility of authorizing such service by exemption when it set aside Order E-9744 (American Airlines v. Civil Aeronautics Board, supra). The combination of the two decisions threatened not only to raise an "insuperable obstacle to the full development of supplemental air service" (278 F. 2d at p. 449), but to imperil the continuation of the then existing operations.

dismissal (J.A. 21), petitioners here argue for applicability of Section 401, and the Board's action otherwise relates to a general subject matter encompassed by the Act. Hence, we believe the Court to be authorized to consider the merits. However, if it should conclude that the Board did not deny petitioners any rights conferred by the Federal Aviation Act, its judgment, we believe, probably should be one of dismissal insofar as P.L. 86-661 is concerned.

Legislation was thus felt to be needed immediately.^{11/} Time, however, was short because of the impending adjournment, and Congress was unwilling to enact permanent legislation until it had had time "to explore in more detail important questions of policy raised by the [United] decision." H. Rept. No. 1877, supra, at p. 2. Thus P.L. 86-661 was, as the Board said (J.A. 16), "an interim, stop-gap measure." Its purpose was to maintain temporarily the status quo as if the Court had not held as it did in United, H. Rept. No. 1877, at p. 7.

In order to maintain the status quo four groups of carriers had to be taken into consideration: (1) those who had received certificates; (2) those whose applications had been deferred pending further hearings before the Board; (3) those, like petitioners, whose certificate applications had been denied but who had appealed such denial to this Court; and (4) those who had not operated before but who had applied for certificates pursuant to the Board's determination in Order E-13436 that the class of supplemental carriers should remain open for limited entry by persons other than the applicants in the Large Irregular case. Careful analysis of P.L. 86-661 and of its legislative history will show that Congress intended to go no further.

In addition to authorizing the validation of the certificates granted by Order E-13436 and set aside in United (a provision which fully protected the interests of the first group of carriers referred

^{11/} See, e.g., testimony of C.A.B. Chairman Gilliland, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7593, 86th Cong., 2d Sess., p. 8.

to above and which is of no concern in this case), H.R. 7593 as originally passed by the House also authorized the Board to grant interim operating authority to any carrier "which (A) has operated . . . pursuant to authority granted under Board Order E-9744 . . . and (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act" (emphasis supplied). It is clear beyond any shadow of a doubt that the purpose of this provision was to protect the interests of those carriers whose applications in the Large Irregular case had been deferred pending further hearings.^{12/} Whether it was intended to apply to carriers who might ultimately prevail on their appeals from the Board's denial of their applications in the Large Irregular case is not altogether clear. The House Committee report makes no mention of the question and some statements made during the brief debate in the House may have suggested that the statute might not have protected their interests in the event of a reversal of the Board's denial.^{13/} Senator Monroney, on the other hand, appears

^{12/} In explaining this provision, the House Committee stated (H. Rept. No. 1877, at p. 7) that it would "empower the Board to continue . . . the operating authority of four carriers which operated as supplemental carriers under Board Order E-9744 and whose applications . . . are still pending before the Board."

^{13/} Congressman Williams, the House Manager, referred specifically to Great Lakes, Currey, and Trans-Alaskan and stated (Cong. Rec., June 24, 1960, p. 13221): "Their case is presently in litigation. This bill is not applicable to them. So they will be in the same status as if this bill had not passed. It does not jeopardize their position and it does not grant them any additional rights."

to have thought that it would. See, e.g., his remarks during the Senate debate, Cong. Rec., June 27, 1960, pp. 13430-13431.^{14/} In any event, it obviously made no provision for the fourth group of carriers, i.e., those who had not been applicants in the Large Irregular case but who had applied for authority on the basis of Order E-13436.

The bill as reported by the conference committee and as eventually enacted made a significant change. Instead of empowering the Board to grant interim operating authority to carriers who had operated pursuant to Order E-9744 and who had applications pending on the date of enactment, it authorized such awards to those (A) who had operated pursuant to that order or (B) who had applications on file on the date of enactment. Clause (A), standing alone, clearly protected applicants found unqualified who had appealed to this Court. It made possible their continued operation during the pendency of their appeals and also preserved for them the fruits of any

^{14/} The following colloquy took place between Senators Cannon and Monroney (Cong. Rec., June 27, 1960, p. 13431):

Mr. CANNON: The issuance of the certificate would be almost automatic as to all the four categories the Senator has mentioned, namely, those that were certificated and operating carriers, those that were certificated but not operating carriers, those that have operated under the Board Order E-9744, on appeal, and those that have applications pending. Is that correct?

Mr. MONRONEY: It is automatic as to the first two, because those are the ones that have been certificated. The others include those that are operating while their cases are on appeal. It is a matter, as to those, for the Court. They can be terminated if the Court denies the appeal. If an application is not filed, that is up to the Court. They are empowered to make that apply or not apply until they have proven their case and their right and entitlement as an operating carrier.

success they might have on their appeals, matters which had concerned the Senate during its debate on the bill.^{15/} Clause (B), on the other hand, protected the interests of applicants for fresh entry into the field. The conference report leaves no room for doubt on this score when it states that the second clause was for the benefit of "persons who had never operated under" Order E-9744.^{16/} H. Rept. No. 2072, 86th Cong., 2d Sess., p. 3.

Thus, the intent was only to accomplish the repeatedly stated Congressional purpose of maintaining the status quo, including the exclusion of carriers such as these petitioners from the benefits of the new legislation unless they obtained a reversal of the Board's denials. See note 13, supra, p. 15. Hence, there is no reasonable basis for petitioners' contention that they should be eligible for operating authority despite the Board's prior denial of their applications and the Court's rejection of their appeals.^{17/} To be sure, a literal reading of the statute leads to the conclusion that P.L. 86-661 does empower the Board to grant petitioners' applications. The Board recognized this but stated "that such a construction would

^{15/} In fact, one carrier did secure a reversal of the Board's denial of its application and thus if that carrier is now found qualified by the Board, there is no doubt of the Board's authority to grant the application.

^{16/} As the Board pointed out, carriers whose applications had been deferred for further hearings were protected whichever version of the bill should be adopted (J.A. 17).

^{17/} If the petitioners should obtain certiorari and eventual reversal by the Supreme Court of this Court's decision in Great Lakes Airlines v. Civil Aeronautics Board, supra, they would of course be eligible for interim operating authority under the statute.

be inconsistent with the Congressional intent" (J.A. 18). In so holding the Board followed well-established principles of statutory construction. "Even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this Court has followed that purpose, rather than the literal words." United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940); Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 285 (1956).

B. In any event, the Board had discretionary power to dismiss petitioners' applications

Petitioners' ultimate position appears to be that, notwithstanding its recent denial of their applications for supplemental authority, the Board nonetheless, within the 20-month period provided by P.L. 86-661, was required again to embark upon full evidentiary hearings for the purpose of again inquiring into their qualifications. Apart from the showing heretofore made that Congress did not intend any such result, we do not believe that the law in any event requires such a waste of administrative time and effort, particularly on the basis of the showing here made. Rather, as the Board said, we think that "an agency, having just completed consideration of a matter, need not immediately thereafter re-entertain a new application for the same authorization" (J.A. 19). We show in this section that this was not required by the letter of the statutory provisions involved, and in point II, that the Board did not abuse its discretion in following the sensible course of dismissal rather than the fruitless task of

rehearing a matter just heard in circumstances where there was no showing of changed facts which would support a result different from that theretofore reached by the Board and thereafter sustained by this Court.

P.L. 86-661 did not in terms require the Board to hold evidentiary hearings on the merits of petitioners' applications prior to their disposition. Further, the terms and the legislative history of the Act make plain that there were some situations in which the Board was expected to act without hearings.^{18/} Moreover, the special nature of the legislation and its short duration make it far more reasonable to conclude, as the Board did (J.A. 18-19), that Congress left the manner of its administration to the sound discretion of the Board. To be sure, the Board must exercise that discretion in a reasonable manner and avoid unfairness, and hearings might be required in circumstances other than are here present.^{19/} This, however, in no way negates the power of the Board to select the procedure most appropriate to the

^{18/} For example, the certificates previously issued were to be validated "without further proceedings." Also, Congress recognized that the certificates awarded to some carriers by Order E-13436 would expire by their own terms prior to the expiration of the 20-month period provided by P.L. 86-661 and yet it was expressly recognized that the Board might renew them upon their expiration without formal proceedings. Cong. Rec., June 27, 1960, p. 13431.

^{19/} Thus, in commenting on the House version, Senator Monroney indicated that "the Board would use normal procedure, as heretofore, with reference to applications that are now pending." Cong. Rec., June 27, 1960, p. 13431.

particular circumstances, and there plainly is no barrier in P.L. 86-661 to the procedure followed here.^{20/}

Petitioners argue, however, that the Board had no choice but to hold full evidentiary hearings on their applications because it must follow the provisions of Section 401(c) of the Federal Aviation Act in taking action under P.L. 86-661. But P.L. 86-661 is not an amendment to the Federal Aviation Act. Rather, as petitioners concede (Br. p. 13), it is a special act designed to meet a special situation on a purely temporary basis. It was chosen by Congress as an alternative to legislation which would have amended the Federal Aviation Act. It stands alone and in no legal sense is a part of the permanent statute. As just shown, P.L. 86-661 does not bind the Board to any rigid procedural ritual or incorporate the procedural requirements of Section 401(c). And even if it did, we submit that Section 401(c) does not preclude a dismissal such as was here involved.

Section 401(c) obviously does not require the Board to proceed immediately to a hearing on a matter just decided, and the Board does

^{20/} Petitioners argue that P.L. 86-661 does not supersede or modify any of the provisions of the Administrative Procedure Act; that Section 12 of the Administrative Procedure Act forbids implied modification of any of its provisions; that Sections 5, 7, and 8 of the Administrative Procedure Act are applicable to proceedings under Section 401(c); and hence that P.L. 86-661 does not empower the Board "to deny petitioners their procedural rights under Section 401 of the Act . . ." The argument, of course, completely begs the question at issue. The Administrative Procedure Act is applicable only if the statute under which the Board takes action specifically requires a hearing. P.L. 86-661 does not. Thus, the cited provisions of the Administrative Procedure Act would apply here only if Section 401 is deemed applicable to petitioners' applications and if that section precludes a discretionary dismissal.

not in fact administer the statute in any such manner. While it is not uncommon for carriers to refile applications for authority only recently denied them, such applications are not immediately reheard but rather await another examination (after a reasonable time) into the needs of the area involved. Here, in view of the short term nature of P.L. 86-661, there was no point in holding the applications on the docket.^{21/} And if the Board may decline to proceed to hearing, as it clearly may, it equally should be permitted to dismiss.^{22/} Any other result would be that a carrier, having received a full and fair hearing (and this Court held that petitioners did) and having been denied operating authority for lack of qualification, may the next day reapply and force the Board to go through the entire adjudicatory process a second time. Indeed, the carrier could do the same thing a third time if the second hearing resulted in denial, and so on ad infinitum. We think it perfectly obvious that such a construction would violate the hornbook rule against construing statutes in such a way as to produce absurd results. It would make the Board a mere puppet in the hands of any carrier disposed to abuse its processes

^{21/} As the Board said (J.A. 15) the real question was one of eligibility under a short-term statute. Obviously, the Congress intended the Board to act promptly with respect to those persons who were eligible. Petitioners, in asserting a right to a new hearing under P.L. 86-661 in effect are claiming a right to be heard "out of turn" in relation to Section 401(c).

^{22/} As the Court is aware, the Ashbacker requirement and the practice of holding area proceedings virtually eliminate any "value" in the pendency of an application as such. Rather, applications can be filed and heard when the subject matter is noticed for activation.

and would make a shambles of administration. To protect against this sort of thing, it is not necessary that the doctrine of res judicata be strictly applicable.^{23/} Rather, discretionary power to dismiss or not to act rests upon necessity. The courts have long recognized this. For example, res judicata is inapplicable to habeas corpus proceedings. It is nevertheless well-established that the courts have discretionary power, based upon necessity, not to entertain repetitious applications for the writ. Salinger v. Loisel, 265 U.S. 224, 230-232 (1924); Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F. 2d 857, 869 (1945), cert. denied, 325 U.S. 890; United States v. Thompson, 144 F. 2d 604, 606 (C.A. 2, 1944), cert. denied, 323 U.S. 970.

The Federal Communications Commission, too, has recognized the existence of such a power with respect to applications despite the fact that its statute contains a provision similar to Section 401(c).^{24/} Moreover, as the Supreme Court pointed out in

^{23/} The Board found it unnecessary to consider whether "res judicata, strictly speaking, is applicable" (J.A. 19) and we make no argument on the point herein.

^{24/} Section 1.309 of the Commission's Rules of Practice (47 C.F.R. 1.309) provides:

"Where the Commission has denied an application for a new station or for any modification of services or facilities, or dismissed such application with prejudice, no like application involving service of the same kind to substantially the same area by substantially the same applicant . . . may be filed within 12 months of the effective date of the Commission's action . . ."

relation to the Communications Act, United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956), the Commission need not hold hearings on all applications which it permits to be filed. Rather, said the Court, "we do not think that Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." In sum, there is no inflexible rule such as the petitioners contend for that all applications must be heard on their merits regardless of the circumstances.^{25/}

Petitioners' final argument on statutory construction is that evidentiary hearings were required by the Section 1005(f) provision that the Board's orders "shall set forth the findings of fact upon which . . . based" (infra, p. 32) and the Administrative Procedure Act requirement (Section 10(e), 5 U.S.C. 1009) that certain findings be supported by "substantial evidence."^{26/} This contention presupposes that the Board's order was issued under the Federal Aviation Act rather than P.L. 86-661, and in any event is without merit. This

^{25/} Petitioners' contention that time will have elapsed between one denial and the processing of another application, and that this factor requires a hearing, is without merit. The same thing is true with respect to the interval between hearing and decision, and yet there is no right to rehearing for that reason alone. See Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514 (1944).

^{26/} This provision is that the reviewing Court shall set aside action and findings "unsupported by substantial evidence in any case subject to the requirements of Section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute."

Court has long recognized that the provisions relied upon do not require a hearing not otherwise required, and that the absence of an "evidentiary" record is no obstacle to review. Eastern Air Lines v. Civil Aeronautics Board, 87 U.S. App. D.C. 331, 185 F. 2d 426 (1950), vacated as moot, 341 U.S. 901; Eastern Air Lines v. Civil Aeronautics Board, C.A.D.C. No. 10671, decided March 15, 1951 (unreported), cert. denied 341 U.S. 951; American Airlines v. Civil Aeronautics Board, 97 U.S. App. D.C. 324, 231 F. 2d 483 (1956); Pan American World Airways v. Civil Aeronautics Board, 104 U.S. App. D.C. 288, 261 F. 2d 754 (1958), cert. denied 359 U.S. 912; cf. Springfield Airport Authority v. Civil Aeronautics Board, ___ U.S. App. D.C. ___, 285 F. 2d 277 (1960). Rather, the stated bases for the Board's action and the pleadings constitute all the "findings" and "evidence" necessary in cases of this sort.

II. If it be assumed that the Board could have granted petitioners' applications, its dismissal nonetheless did not constitute an abuse of discretion

As this Court recognized in rejecting the petitioners' appeals from Order E-13436, they had a full and fair hearing on their applications in the Large Irregular Air Carrier Investigation. They were given every opportunity to present all relevant evidence on their qualifications and to cross-examine and rebut adverse evidence introduced by the other parties. Their applications were denied upon the basis of findings that in the past they had violated numerous sections of the Act and hence lacked the compliance disposition essential to qualification. On appeal, the petitioners challenged neither these findings nor the evidentiary basis therefor, and this Court has just sustained the denial of their applications. The applications which were dismissed by the order under review were for authority to conduct identical operations.

Thus, petitioners were fully heard in Docket 5132 on the issue of their qualifications for supplemental authority, and, in their appeal, recognized that the conduct found by the Board was disqualifying through their failure to contend otherwise. As a matter of common sense, there was no reason why the Board should again hold hearings on the issues so recently determined unless there were strong affirmative reasons therefor. There were no such reasons, and the record does not support petitioners' contentions that there was such a time lag between hearing and decision therein, or changed circumstances since the decision there, as to justify

further hearings here.^{27/} Petitioners did not allege any facts to the Board either in their applications, in response to the motion to dismiss, or in their petitions for reconsideration which would show that their control by persons whose management had rendered them untrustworthy had changed. Indeed, in their petition for rehearing filed in case Nos. 15,015, et al. on March 9, 1961, Great Lakes and Currey in effect conceded to the Court that their present management is the same as that whose conduct was found disqualifying by the Board (pp. 4 and 5 of petition for rehearing).

When the Board determined in 1954 to proceed to decision on the public interest issues in the Large Irregular case (Tr. 61A) many of the applicants had already presented their cases on qualifications. Thus, the first initial decision contained findings not only with respect to the public interest issues but also on the qualifications of the carriers already heard (Tr. 372A). Among these were Great Lakes and Currey who were found unfit because of their past illegal conduct (Tr. 502A-533A). Thereafter, in August of 1955, the Board reopened the proceeding to continue hearings on the applicants' qualifications and at the same time it vacated all of the examiners' prior findings thereon (Tr. 864A). Still later, in response to a petition by Great Lakes, the Board specifically ordered the record reopened to permit that carrier to present additional evidence concerning alleged

^{27/} In discussing this question, reference is made to the printed record on file in this Court in petitioners' appeal in cases 15,015, et al. In order to avoid confusion with the printed record in the instant case, references thereto will be marked "Tr."

changes in its qualifications (Tr. 1495A) and in December 1955 it ordered that the reopening be expanded in order to explore the relationship, if any, between Great Lakes and Currey (Tr. 1496). As a result of these orders Great Lakes actually introduced additional evidence (Tr. 1023A) and while Currey did not (Tr. 1033A), the examiners acceded to its request that they take official notice of and consider facts said to constitute changes in its management and ownership (Tr. 1034A). Thus, it may be observed at this point they convey a false impression when they suggest that their cases were concluded in 1953 (Br. p. 11). The fact is that all three petitioners were heard in their turns in the later phases of the proceeding which lasted into 1956.^{28/}

In January 1957, the examiners issued their initial decision on the applicants' qualifications. All three petitioners were found unqualified because of their persistent violations of the Act. Thereafter, in July 1957, they sought a reopening "to bring the record up to date in order to show a willingness and ability" to comply with the law (Tr. 1504A). The Board refused because the motion contained only "general allegations . . . as to improvements in various respects, unsupported by specific indications of substantial betterment constituting significant change" (Tr. 1090A).

Even after issuance of Order E-13436 in January 1959, petitioners renewed their contention that the Board had improperly decided the

^{28/} Trans-Alaskan, of course, was heard only in the reopened portion.

case upon a "stale" record. In its opinion and order on reconsideration issued on September 15, 1959 (Order E-14449, Tr. 1346A), the Board adhered to its view that they had made no showing justifying further hearings on the matter. When petitioners challenged the final decision in this Court, they abandoned any contention that the Board had improperly denied their motion to "bring the record up to date" or that it had decided the case on a "stale" record.^{29/}

The foregoing recital places the petitioners' present contention in its true context. The final decision on petitioners' qualifications did not come until September 1959. Upon the basis of an unchallenged record the Board found that they had committed violations of the Act "so wanton and deliberate that there is no basis in this record for concluding that they could be expected to abide by the law in the future . . . , so serious in nature that they outweigh any possible benefits that might accrue to the public from their service."^{30/}

^{29/} The reference in petitioners' brief (p. 10) to Judge Fahy's dissent in Great Lakes is wholly misleading. Judge Fahy was not talking about a "stale record" issue but about a question of notice and of petitioners' alleged lack of opportunity to rebut evidence of specific violations. The Board's findings of violations in Order E-13436 could hardly be said to be open to collateral attack.

^{30/} The quoted language refers to Great Lakes and Currey. Trans-Alaskan's violation involved its illegal control by the other two carriers. Furthermore, less than two weeks later the Board concluded an enforcement proceeding against Great Lakes and Currey in which it ordered the revocation of their operating authority because of the same violations which had led it to find them unqualified in the Large Irregular case. Order E-14491. A petition for review is presently pending in the Court of Appeals for the Ninth Circuit.

To be sure, these findings are not to be regarded as a permanent attainer and the Board so stated (J.A. 21).^{31/} It also recognized that some time had elapsed between the final decision in the Large Irregular case and the filing of the present applications (J.A. 19). It was, however, a bare nine months, and in any event, as the Board said (ibid.), time alone should not be regarded as controlling. Considering the shortness of the time and the extreme seriousness of their violations which indicated a flagrant disregard for the law, the Board can scarcely be said to have been unreasonable in insisting upon some sort of showing that there would be some point in embarking a second time upon a consideration of the petitioners' qualifications, particularly in view of the fact that the only possible statutory basis for granting the applications was of such short duration. They answered with a few generalities. They said simply that there had been "substantial changes" in their financial condition, operations, and employees and that they would "introduce evidence" to show that they had the requisite compliance disposition (J.A. 10). As the Board said (J.A. 20) the same sort of allegations were made in the motion to reopen the Large Irregular case and they "no more justify instituting a new proceeding than they did . . . reopening an existing proceeding."

^{31/} The petitioners' reliance on Payne v. Minkoff, 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953) is thus misplaced. Further, the Court did not there hold that hearings must be conducted when a prior application has just been denied. It clearly left the matter to the agency's discretion.

CONCLUSION

The petition for review should be dismissed or the Board's order should be affirmed.

Respectfully submitted,

LEE LOEVINGER,
Assistant Attorney General,

RICHARD A. SOLOMON,
Attorney,
Department of Justice,

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.

O. D. OZMENT,
Associate General Counsel,
Litigation and Research,

ROBERT L. TOOMEY,
Attorney,
Civil Aeronautics Board.

April, 1961

APPENDIX

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731 (49 U.S.C. 1301 et seq.) are:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * *

ORDERS, NOTICES, AND SERVICE

Form and Service of Orders

Sec. 1005. [72 Stat. 794, 49 U.S.C. 1485] * * *

(f) Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. * * *

* * * * *

The Act of July 14, 1960, 74 Stat. 527 (P.L. 86-661) provides as follows:

* * * "That the Civil Aeronautics Board (hereafter in this Act referred to as the 'Board') is empowered--

(1) to validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to

authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

Sec. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board--

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certificate of public convenience and necessity issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, or against the holder of any operating authority conferred under Board Order E-9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the conferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E-9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point."

* * * * *

REPLY BRIEF FOR PETITIONERS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CUREY AIR TRANSPORT
LIMITED, TRANS-ALASKAN AIRLINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition to Review an Order of the
Civil Aeronautics Board

United States Court of Appeals
For the
District of Columbia Circuit

FILED

APR 17 1961

Joseph W. Stewart
CLERK

KEATINGE AND OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

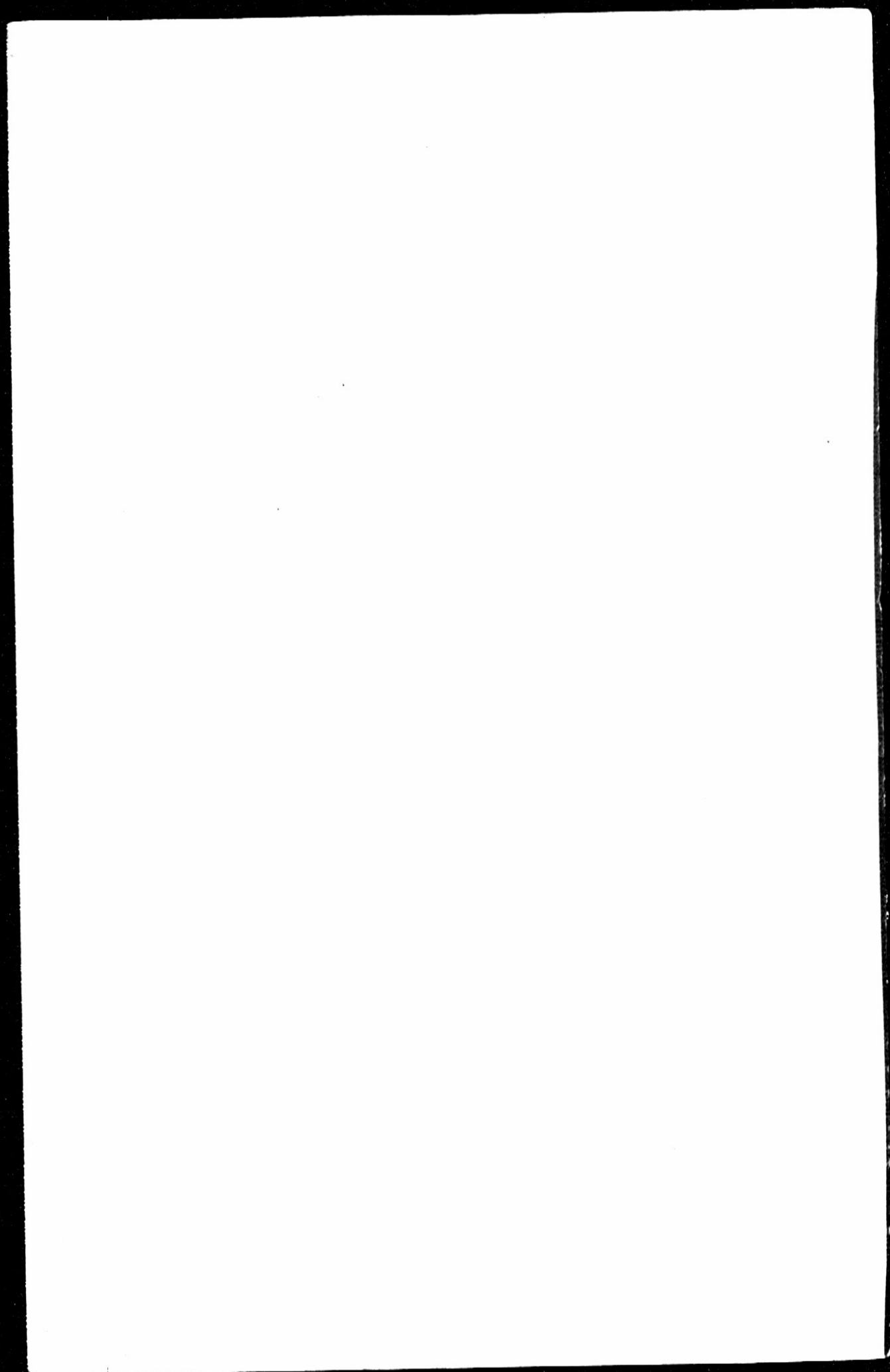
Of Counsel

Dated: April 17, 1961

CHARLES H. OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

DAYTON M. HARRINGTON
454 Washington Building
Washington 5, D. C.

Attorneys for Petitioners



INDEX

	Page
I. The Applications for Certificates Filed by Petitioners are Eligible for Consideration Under Public Law 86-661	1
II. The Board Lacks Discretionary Power to Dismiss Petitioners' Applications	5
III. Hearings on Petitioners' Applications Would Not Require the Board to Inquire Into Any Matters Already Covered in the Large Irregular Proceeding	6
Conclusion	8
Appendix A	9
Appendix B	11

TABLE OF AUTHORITIES

CASES:

<i>Caminetti v. United States</i> , 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442	2
<i>Great Lakes Airlines, Inc. v. Civil Aeronautics Board</i> , (No. 15,015, et al.) — U.S. App. D.C. —, — F. 2d — (1961)	7
<i>Hamilton v. Rathbone</i> , 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219	2
<i>Swarts v. Siegel</i> , 117 Fed. 13 (CA 8)	3
<i>United Air Lines v. Civil Aeronautics Board</i> , — U.S. App. D.C. —, 278 F. 2d 446, judgment vacated — U.S. —, — S. Ct. —, — L. Ed. 2d — (October 24, 1960)	5, 8

STATUTES:

Federal Aviation Act of 1958:

Section 401	5, 7, 8
Section 403	7
Section 408	7
Section 412	7
Section 1005(e)	7

	Page
<i>Public Law 86-661,</i>	
74 Stat. 527, Enacted July 14, 1960	1, 2, 3, 4, 5, 6, 8

CIVIL AERONAUTICS BOARD ORDERS:

<i>Order No. E-9744, Adopted November 15, 1955</i>	3, 4, 5
<i>Order No. E-13436, Adopted January 28, 1959</i>	3, 4, 5

TEXTS:

Sutherland, *Statutory Construction*,
Third Edition (1943)

Vol. II, Sec. 4502	2
Vol. II, Sec. 4702	3

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT
LIMITED, TRANS-ALASKAN AIRLINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition to Review an Order of the
Civil Aeronautics Board

REPLY BRIEF FOR PETITIONERS

I. THE APPLICATIONS FOR CERTIFICATES FILED BY PETITIONERS ARE ELIGIBLE FOR CONSIDERATION UNDER PUBLIC LAW 86-661.

In its brief the Board argues that the applications for certificates filed by petitioners are not eligible under Public Law 86-661, and that even if it be assumed that their applications are embraced within the provisions of that law, the Board nevertheless has discretionary power to dismiss the applications without a hearing.

	Page
<i>Public Law 86-661,</i>	
74 Stat. 527, Enacted July 14, 1960	1, 2, 3, 4, 5, 6, 8

CIVIL AERONAUTICS BOARD ORDERS:

<i>Order No. E-9744, Adopted November 15, 1955</i>	3, 4, 5
<i>Order No. E-13436, Adopted January 28, 1959</i>	3, 4, 5

TEXTS:

Sutherland, *Statutory Construction*,
Third Edition (1943)

Vol. II, Sec. 4502	2
Vol. II, Sec. 4702	3

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,165

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT
LIMITED, TRANS-ALASKAN AIRLINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition to Review an Order of the
Civil Aeronautics Board

REPLY BRIEF FOR PETITIONERS

I. THE APPLICATIONS FOR CERTIFICATES FILED BY PETITIONERS ARE ELIGIBLE FOR CONSIDERATION UNDER PUBLIC LAW 86-661.

In its brief the Board argues that the applications for certificates filed by petitioners are not eligible under Public Law 86-661, and that even if it be assumed that their applications are embraced within the provisions of that law, the Board nevertheless has discretionary power to dismiss the applications without a hearing.

The references in the Board's brief to the legislative history of Public Law 86-661 demonstrate that the legislators considered at length before the Act was enacted the question of which carriers were to be eligible for consideration under the Act. The Board's brief, however, fails to give the answer to the most significant question. If Congress, being mindful of the problems of the supplemental carriers, the Board's 1959 decision in the Large Irregular Proceeding, and the question of which carriers should be included within the provisions of any grant of authority by Congress, intended to exclude those carriers which were denied certificates in the Large Irregular Proceeding from further consideration under Public Law 86-661, then why was the statute drafted in a form which clearly includes such carriers within its scope? If Congress had intended to exclude petitioners and other carriers similarly situated, it would have been a simple matter to exclude them expressly. This was not done. The Board states in its brief [p. 17]:

"To be sure, a literal reading of the statute leads to the conclusion that P.L. 86-661 does empower the Board to grant petitioners' applications. The Board recognized this but stated 'that such a construction would be inconsistent with the Congressional intent' [J.A. 18]. In so holding the Board followed well-established principles of statutory construction."

The most common rule of statutory interpretation is that a statute clear and unambiguous on its face need not and cannot be interpreted by a Court, and only those statutes which are ambiguous and of doubtful meaning are subject to the process of statutory interpretation.¹ One Court has said:

"There is no safer nor better settled canon of interpretation than that when language is clear and

¹ Sutherland, *Statutory Construction*, Third Edition (1943), Vol. II, Sec. 4502; *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442; *Hamilton v. Rathbone*, 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219.

unambiguous it must be held to mean what it plainly expresses."²

Concerning the literal reading of a statute, Sutherland says:³

"One who contends that a section of an act must not be read literally must show either that some other section of the act expands or restricts its meaning, that the section itself is repugnant to the general purview of the act, or the act considered *in pari materia* with other acts, or with the legislative history of the subject matter, imports a different meaning. If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the Court cannot give it a different meaning. . . ."

The legislative history referred to in the Board's brief shows without question, as the Board concedes, that the question of which carriers should be included within the scope of Public Law 86-661 was considered by Congress. The intent of Congress is clearly expressed in the unambiguous language of the statute.

To demonstrate the fallacy in the Board's contention that petitioners are not included among the carriers eligible under Public Law 86-661, it is necessary to examine in detail the provisions of that statute and of the Board's 1955 and 1959 orders in the Large Irregular Proceeding [Order E-9744, adopted November 15, 1955, Appendix A to this brief; Order E-13436, adopted January 28, 1959, Appendix B to this brief]. Public Law 86-661 [Appendix to pets.' opening brief, pp. 29, 30] provides in part that the Board is empowered—

"(2) To confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enact-

² *Swarts v. Siegel*, 117 Fed. 13 (CA 8).

³ Sutherland, *Statutory Construction*, Third Edition (1943), Vol. II, Sec. 4702.

ment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act."

Board Order E-9744 of November 15, 1955, authorized 49 carriers to operate in interstate air transportation as supplemental air carriers.

The Board's 1959 decision [Order E-13436] granted certificates to 23 of the 49 carriers granted authority under Order E-9744. The carriers awarded certificates by Order E-13436 are expressly included under the provisions of Section 1(1) of Public Law 86-661. Of the remaining 26 carriers originally authorized by Order E-9744, 16 were denied authority by Order E-13436, and decision was deferred therein as to 8 more.⁴

Thus, that portion of Public Law 86-661 which states:

"any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955"

includes 26 carriers granted authority under Order E-9744, of which 16 of those 26 carriers were denied certificates under Order E-13436. All of this was well known to Congress when Public Law 86-661 was enacted, as the Board's brief points out. Yet the Board's brief argues that, notwithstanding Congress included 26 carriers authorized under Order E-9744 as eligible under Public Law 86-661, Congress actually intended to exclude 16 of those 26 carriers from eligibility.

Under the circumstances of this case it is difficult to conceive how Congress could make an error of that magnitude or how any rational rule of statutory construction

⁴ Order E-13436, pars. 3, 4 and 5, Appendix B to this brief.

could produce that result. Moreover, if Congress had intended to exclude from eligibility under Public Law 86-661 the carriers denied certificates under Order E-13436, there was no reason for basing eligibility on the prior grant of authority under Order E-9744, which included those carriers later denied certificates under Order E-13436. All that Congress needed to do to exclude the carriers which were denied certificates was to expressly limit eligibility under Public Law 86-661 to those carriers which were not denied certificates under Order E-13436.

It seems a far more reasonable construction of Public Law 86-661 to attribute to Congress an intent to give the Board the power to reconsider during the effective period of the statute all of the carriers before the Board in the Large Irregular Proceeding at the time of its 1955 decision [Order E-9744]. The supplemental air carrier industry was confused and in doubt as a result of this Court's reversal of the Board's 1955 and 1959 decisions. The Board was in doubt as to its authority to license the supplemental carriers. Congress acted to relieve the vacuum created by this Court's decision in the *United* case. Congress gave the Board power to authorize the operations of all of the supplemental carriers pending further action by Congress or the Board. The Board was not required to authorize all of the carriers, but it was given the authority to do so. Public Law 86-661 accomplished that purpose.

II. THE BOARD LACKS DISCRETIONARY POWER TO DISMISS PETITIONERS' APPLICATIONS

The Board's brief argues in substance that the Board has the power to consider an application for a certificate as having been filed pursuant to Public Law 86-661, notwithstanding that the application states on its face that it is filed pursuant to Section 401 of the Act, and then dismiss the application without hearing because Public Law 86-661 does not by its terms require a hearing.

The Board's brief is generous in supplying quotations and references concerning the legislative history of Public Law 86-661 and the intent of Congress on the question of which carriers are eligible thereunder. The Board's brief is silent, however, on the subject of the legislative history and Congressional intent as it relates to procedural rights under Public Law 86-661.

It is true that Public Law 86-661 does not by its express terms require a hearing. Neither does it dispense with a hearing. The fact is that the statute does not purport to deal with procedural requirements. This is not to say that the statute in any way diminishes the procedural requirements in a certificate proceeding. The statute simply does not undertake to modify or change the elaborate procedural requirements applicable to certificate proceedings found in the Federal Aviation Act and the Administrative Procedure Act.

III. HEARINGS ON PETITIONERS' APPLICATIONS WOULD NOT REQUIRE THE BOARD TO INQUIRE INTO ANY MATTERS ALREADY COVERED IN THE LARGE IRREGULAR PROCEEDING

The Board's brief argues that if petitioners' applications were set for hearing, the Board would merely be inquiring into matters already covered in the Large Irregular Proceeding. But the fitness of petitioners to be determined is their present fitness. The Board's determination of petitioners' qualifications in the Large Irregular Proceeding was based upon evidence six to eight years old at the time the Board's decision was made. The Board's decision was made over two years ago.

In that connection the statement in the Board's brief [pp. 26, 27] that petitioners had an opportunity to present additional evidence on their qualifications in 1955 and 1956 is wholly misleading. The Board reopened the record in 1955 in order to receive evidence of *changes*, if any, which had occurred since the prior hearing, and the exam-

iners refused to receive any evidence not limited solely to that question. Evidence to explain or rebut any evidence received prior to the reopened proceeding was not admissible by the terms of the order reopening the proceeding and the examiners' rulings. The hearing on the alleged Great Lakes-Currey relationship was limited to evidence on that question alone. But Great Lakes was found to have violated Sections 401, 403, 408, 412 and 1005(e) of the Act, and the evidence upon which the findings were based, except for evidence received in the Trans-Alaskan case, was six to eight years old at the time the Board's decision was made.

There can be little doubt that petitioners' qualifications have changed after eight to ten years of continuous operation. Yet the Board seems to believe that petitioners are forever foreclosed from prosecuting new applications for certificates.

Any suggestion [Board's brief, footnote 7, p. 8] that petitioners abandoned their contention that they were denied due process by the Board's failure to reopen the Large Irregular Proceeding to permit petitioners to introduce evidence in rebuttal to the alleged violations, concerning which petitioners received no notice until the examiners' decision, is untrue and misleading. That issue was expressly raised in petitioners' briefs on appeal to this Court in *Great Lakes Airlines, Inc., et al. v. Civil Aeronautics Board* [Case No. 15,015, et al.], was argued during the oral argument in that appeal, and was again raised in the petition for rehearing en banc filed in this Court in that appeal. Moreover, Judge Fahy, in his dissent in the *Great Lakes* case, stated that petitioners were denied due process as a result of the Board's failure to reopen the hearing when requested by petitioners after the specific violations found were first made known to petitioners by the examiners' decision.

CONCLUSION

Petitioners, upon filing applications for certificates, were entitled to an adjudicatory hearing under Section 401 of the Act, the Administrative Procedure Act, and the Board's regulations. Public Law 86-661 authorized the Board to validate certificates for supplemental air service, in a form otherwise invalid as determined by this Court in the *United* case, for a period of twenty months. Public Law 86-661 did not eliminate the hearing or other procedural requirements found in the Federal Aviation Act or the Administrative Procedure Act. Petitioners are clearly eligible under the provisions of Public Law 86-661.

The Board's order should be reversed and the case remanded to the Board.

Respectfully submitted,

CHARLES H. OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

DAYTON M. HARRINGTON
454 Washington Building
Washington 5, D. C.

Attorneys for Petitioners

KEATINGE AND OLDER
3325 Wilshire Boulevard
Los Angeles 5, California

Of Counsel

April 17, 1961.

APPENDIX A

Board Order No. E-9744, Par. 1
(Adopted November 15, 1955)

ORDER GRANTING EXEMPTION

A full public hearing having been held in the above entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

On the basis of the foregoing record and opinion, and acting pursuant to section 416(b) of the Civil Aeronautics Act of 1938, as amended, the Board further finds that the enforcement of the provisions of sections 401(a), 404(a) (to the extent that it requires an air carrier to provide adequate service) and 405(e) of the Act insofar as such enforcement would otherwise prevent the carriers named in paragraph 1, below, from engaging in air transportation of the type herein authorized, would be an undue burden on such carriers by reason of the limited extent of, and the unusual circumstances affecting, the operations of such carriers.

IT IS ORDERED THAT:

1. Aero Finance Corporation
Air Cargo Express, Inc.
Airline Transport Carriers, Inc.
Air Services, Inc.
All American Airways, Inc.
American Air Export and Import Co.
American Flyers Airline Corp.
Arctic-Pacific, Inc.
Argonaut Airways Corporation
Arnold Air Service, Inc.
Associated Air Transport, Inc.
Aviation Corporation of Seattle

Great Lakes Airlines, Inc.
Johnson Flying Service, Inc.
Los Angeles Air Service, Inc.
Meteor Air Transport, Inc.
Miami Airline, Inc.
Modern Air Transport, Inc.
Overseas National Airways
Paul Mantz Air Services
Peninsular Air Transport
Quaker City Airways, Inc.
Regina Cargo Airlines, Inc.
Royal Air Service
Blatz Airlines, Inc.
California Air Charter, Inc.
Capitol Airways, Inc.
Caribbean American Lines, Inc.
Central Air Transport, Inc.
Coastal Cargo Co., Inc.
Conner Air Lines, Inc.
Continental Charters, Inc.
Currey Air Transport, Ltd.
Economy Airways, Inc.
Monorch Air Service
General Airways, Inc.
Southern Air Transport
Sourdough Air Transport
S.S.W., Inc.
Standard Airways
Stewart Air Service
Trans-Alaskan Airlines, Inc.
Trans-Caribbean Airways, Inc.
Transocean Air Lines
The Unit Export Company, Inc.
U. S. Aircoach
United States Overseas Airlines, Inc.
World Wide Airlines, Inc.
World Airways, Inc.

(herein collectively described as "supplemental air carriers") be and hereby are temporarily exempted, to the extent necessary to perform air transportation in charter services and individual services as defined in Appendix A hereto and subject to the terms, conditions, and limitations herein and therein contained, from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

(a) Subsection 401(a);

(b) Subsection 404(a): *Provided, however*, that each supplemental air carrier shall abide by those provisions of this subsection which require air carriers to provide safe service, equipment, and facilities in connection with interstate and overseas air transportation; and to establish, observe and enforce just and reasonable individual rates, fares and charges and just and reasonable classifications, rules, regulations and practices relating to such air transportation;

(c) Subsection 405(e).

APPENDIX B

Board Order No. E-13436, Pars. 1-8, Incl.
(Adopted January 28, 1959)

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record and on the basis of the findings and conclusions set forth in the Board's 1955 decision herein, Orders Nos. E-9744 of November 15, 1955, and E-9884 of December 29, 1955, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That certificates of public convenience and necessity for supplemental air service in the form attached hereto be issued to the following as supplemental air carriers, and that the duration of each certificate so issued be of the number of years indicated in parentheses after the name of each supplemental air carrier:

All American Airways, Inc. (2)
 American Flyers Airline Corp. (5)
 Arctic-Pacific, Inc. (2)
 Associated Air Transport, Inc. (2)
 Aviation Corp. of Seattle (2)
 Blatz Airlines, Inc. (2)
 California Eastern Aviation, Inc. (5)
 Capitol Airways, Inc. (5)
 Coastal Cargo Company (5)
 Conner Air Lines, Inc. (2)
 General Airways, Inc. (5)
 Johnson Flying Service, Inc. (5)
 Modern Air Transport, Inc. (2)
 Overseas National Airways, Inc. (5)
 Paul Mantz Air Services (2)
 Regina Cargo Airlines, Inc. (2)
 Sourdough Air Transport (2)
 Southern Air Transport, Inc. (5)
 Standard Airways (5)
 Stewart Air Service (5)
 Transocean Air Lines, Inc. (5)
 United States Overseas Airlines, Inc. (2)
 World Airways, Inc. (5);

2. That said certificates shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and, subject to the extension of their effective dates in accordance with the provisions of such certificates, shall be effective on March 30, 1959;

3. That the record in this proceeding be held open (a) for a period of 30 days from the effective date of this order for the purpose of receiving applications for certificates of public convenience and necessity for supplemental air service which may be filed herein by Argonaut Airways Corporation, Quaker City Airways, Inc. and Los Angeles Air Service, Inc., and (b) for a further period of 15 days from the expiration of said 30-day period for the purpose of receiving answers which may be filed by any party in this proceeding in opposition to such applications as may be filed in accordance with the provisions of this paragraph;

4. That the record in this proceeding be and it hereby is reopened for further hearing at a time and place hereafter to be designated on the qualifications for supplemental air service authorization of Airline Transport Carriers, Inc., Meteor Air Transport, Inc., Miami Airline, Inc., S.S.W., Inc., and World Wide Airlines, Inc.

5. That the interim exemption authority for supplemental air service granted herein by Order No. E-9744 dated November 15, 1955, as amended by Order No. E-9884 dated December 29, 1955, and as provided for in Order No. E-10161 of April 3, 1956—

(a) shall terminate with respect to each of the carriers whose names are set forth in paragraph "1" of this order (except California Eastern Aviation, Inc.¹) upon the effectiveness of the certificates respectively issued thereby: *Provided, however,* that the operating authority heretofore held by such carriers to engage in overseas and foreign air transportation and air transportation between places in the same territory or possession pursuant to said orders shall continue in effect until further order of the Board.

¹ California Eastern Aviation, Inc., was never issued interim supplemental authority.

(b) shall continue in effect with respect to each of the carriers whose names are set forth in paragraphs "3" and "4" of this order until further order of the Board, and

(c) shall terminate 60 days after the effective date of this order with respect to the following carriers:

Air Services, Inc.
 Air Cargo Express, Inc.
 California Air Charter, Inc.
 Central Air Transport, Inc.
 Continental Charters, Inc.
 Economy Airways, Inc.
 Great Lakes Airlines, Inc.
 Currey Air Transport, Ltd.
 Trans-Alaskan Airlines, Inc.
 Monarch Air Service, Inc.
 The Unit Export Company, Inc.
 U. S. Aircoach;

6. That all applications consolidated herein for certificates or for exemptions, except insofar as such applications seek authority for overseas and/or foreign air transportation and/or air transportation between places in the same territory or possession, heretofore filed by the carriers whose names are set forth in subparagraph (c) of paragraph "5" of this order, above, and by the following applicants, namely,

Aero Finance Corporation
 Peninsular Air Transport
 Air Transport Associates, Inc.
 American Air Transport, Inc.
 Freight Air, Inc.
 North American Airlines, Inc.
 (Twentieth Century Airlines, Inc.)
 Hemisphere Air Transport
 Trans American Airways, Inc.

Trans National Airlines, Inc.
Trans Caribbean Airways, Inc.
Western Flying Service, Inc.

be and they hereby are denied, and that decision upon such applications, insofar as not denied by this paragraph, be and it hereby is deferred until further order of the Board.

7. That, except to the extent hereinabove granted, all applications consolidated herein for certificates or for exemptions, except insofar as such applications seek authority for overseas and/or foreign air transportation and/or air transportation between places in the same territory or possession, heretofore filed by the carriers whose names are set forth in paragraph "1" of this order, be and they hereby are denied, and that decision upon such applications, insofar as not denied by this paragraph or hereinabove granted, be and it hereby is deferred until further order of the Board;

8. That decision upon all applications consolidated herein heretofore filed by the carriers whose names are set forth in paragraphs "3" and "4" of this order be and it hereby is deferred until further order of the Board.